FILE COPY

JAN 2 1942

IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No. 132

LOCAL 807, ETC., ET AL.,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR THE PETITIONERS

LOUIS B. BOUDIN,
EDWARD C. MAGUIRE,
Attorneys for Petitioner Local 807.

LOUIS B. BOUDIN,
Attorney for Petitioner Cahill.

JAMES D. C. MURRAY,
Attorney for individual petitioners other than Cahill.

LOUIS B. BOUDIN,
EDWARD C. MAGUIRE,
JAMES D. C. MURRAY,
of Counsel.

INDEX

PAGE

PART ONE

THE ANTI-RACKETEERING ACT IS UNCONSTITUTIONAL 1

I—The power of the Federal Government with respect to any matter which may be within its competency varies with the subject upon which it is exerted 3

II—For a century and a quarter of the existence of the nation under the Constitution Congress has scrupulously limited its legislation dealing with crime as to such matters withdrawn by the Constitution from the competency of the several States 5

III—Congress has never defined a crime over which another government had concurrent jurisdiction without providing against double jeopardy 7

IV—The "commerce power" comprises various things which must be sharply differentiated 9

V—Moore v. Illinois—its cause and cure 12

VI—Congress has never before legislated on crimes of violence in interstate commerce. Nor on crimes of violence in foreign commerce as a means of regulating the same 14

VII—There is a basic difference between civil and criminal statutes with respect to the power which may be exercised by the Federal Government under the commerce clause 17

VIII—The Anti-Racketeering Act is substantially identical with the extortion laws of the various states 20

PAGE

IX—There can be no "complementary State legislation" to Federal legislation regulating interstate commerce 25

X—Two criminal laws on the same subject of necessity conflict with each other 35

XI—The theory of Government counsel upon which they seek to sustain the constitutionality of this Act violates the uniformity principle of Federal legislation 37

XII—The theory of Government counsel upon which they seek to sustain the constitutionality of this Act would make our criminal law unworkable 38

XIII—The protection of individual citizens against double jeopardy is as important as the proper distribution of governmental powers under our constitutional system 39

PART TWO

THE INDICTMENT IS VIOLATIVE OF BASIC LEGAL PRINCIPLES AS WELL AS OF CONSTITUTIONAL GUARANTEES 40

I—The failure to allege overt acts is contrary to basic legal principles 40

II—The indictment is violative of constitutional guarantees 41

TABLE OF CASES

	PAGE
Bowman v. Chicago & Northwestern Railroad Co., 125 U. S. 465	29, 31
Brown v. Maryland, 12 Wheat. 419	12, 26
Cross v. North Carolina, 132 U. S. 132	23, 24
Crossley v. California, 168 U. S. 640	22
DeCuir Case	34
Fox v. Ohio, 5 How. 410	22, 23, 25, 27
Gibbons v. Ogden	26, 28
Hagner v. United States, 285 U. S. 427	44
Kidd v. Pearson, 128 U. S. 1	32, 34
McKelvey v. United States, 260 U. S. 353	24, 25
Mercer v. United States, 61 F. (2d) 97	42
Moore v. Illinois, 14 How. 13	12, 13, 21, 25
Mugler v. Kansas, 123 U. S. 623	29
Neagle, In re, 135 U. S. 1	38
New York Central Railway v. Hudson Board, etc.	34
Nick v. United States	18
E. V. Parker v. Motor Boat Sales, Inc., 86 Law. Ed. 251	34
People v. Buchalter et al.	35
Sherlock v. Alling, 93 U. S. 99	28, 29
Ex parte Siebold, 100 U. S. 371	22
Thornton v. United States, 271 U. S. 414	48, 49
United States v. Brigantine William, 2 American Law Journal 264	4
United States v. Coombs, 12 Pet. 72	10, 11, 22, 36
United States v. Guiteau, 1 Mackey 498, 528	6
United States v. E. C. Knight & Co., 156 U. S. 1	32
United States v. Lanza, 260 U. S. 377	22, 25
United States v. Marigold, 9 How. 560	15, 22
United States v. Patterson, 55 Fed. Rep. 605	40
Wolpa v. United States, 86 F. (2d) 35, 299 U. S. 611	49
Wong Tai v. United States, 273 U. S. 77	46, 47

STATUTES

PAGE

Act of June 15, 1917:
Title IV, Sec. 1 ..... 15, 16

Embezzlement Act of 1914:
Chap. 323, Laws 1914; now Sec. 412, Title 18, U. S. C. A. 7, 8, 34

Federal Crimes Act of 1790:
First Congress, Second Session, Chap. 9 ..... 5, 6, 7

Federal Crimes Act of 1825:
Laws of 1825, Chap. 65 ..... 6, 7
Sec. 5 8
Sec. 9 (Sec. 488, Title 18, U. S. C. A.) 10

Labor Law (N. Y.), Sec. 715 19

Larceny Act of 1913:
Chap. 50, Laws 1913; now Sec. 409, Title 18, U. S. C. A. 6, 8, 9, 14, 34

Lindbergh Act of 1932 14

Opium Act:
Sec. 171, Title 18, U. S. C. A. 46

United States Code:
Sec. 381, Title 18 (Act of June 15, 1917) 14, 15

IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No. 132

LOCAL 807, etc., et al.,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY BRIEF

PART ONE

THE ANTI-RACKETEERING ACT IS UNCONSTITUTIONAL.

Government Counsel, in their brief, declined to argue the question of the constitutionality of the Anti-Racketeering Act, on the ground that the constitutionality of the Act is too clear to require any argument.[1] Ordinarily, we should let it go at that, and not discuss that problem here again. Unfortunately, in the couple of pages allotted to this subject, Counsel for the Government managed to mis-

[1] In justification of this attitude Government Counsel refer to the fact that "although the defendants pressed in the court below the same arguments as to constitutionality which they press here, the court did not consider the contention of sufficient substance to merit even passing reference." Counsel for the Government have apparently forgotten the rule which requires courts not to pass upon the constitutionality of legislative acts unless it be necessary to the decision of the case. The court below having come to the conclusion that the act is *inapplicable* to the case at bar and that the judgment must be reversed, it could not discuss the question of the constitutionality of the Act.

represent our position, at least impliedly;[2] and also to seriously confuse in an important respect the legislative history of our subject. We therefore feel compelled to discuss the subject again at some length. And we would like to begin by stating succinctly our position so that there may be no misunderstanding about it. It is this:

1. We believe that the Constitution does not give the Federal Government the power to deal with crime as such, and prohibits any attempt to deal with violence as such except under the special circumstances provided for by the Constitution.

2. If it be held that it was the intention of Congress that the Anti-Racketeering Act should cover the subject of extortion and racketeering to the exclusion of state legislation, the Act is unconstitutional as an unwarranted invasion of the powers of the States.

3. If it be held that Congress had no intention to invade the competency of the States, and the States continue to be free to deal with extortion and racketeering, the Act is unconstitutional as violative of constitutional guarantees affecting individual liberty.

4. A construction of the Act which would permit both governments to deal with the subject of extortion and racketeering would wreck this branch of our criminal law and would make its enforcement either impossible or intolerable. Such a construction should therefore be avoided.

---

[2] The section of the brief dealing with this subject commences with the following truly amazing paragraph:

"Defendants contend that the Constitution, by authorizing Congress to deal with certain crimes—counterfeiting United States money, piracy and felonies on the high seas, and treason—deprived it of power to deal with *other crimes.* But the power of Congress to *impose criminal penalties for violation of laws enacted in pursuance of its delegated powers,* and thus to secure obedience to these laws, is too long and too firmly established to require citation of authority or argument."

As if the two sentences covered the same subject-matter!

5. We do not claim that the United States has no power to make it a crime to violate any laws enacted by Congress in pursuance of powers delegated by the Constitution to the Federal Government.

6. We do not claim that Congress may not, as a means of regulating commerce, under the Commerce Clause, prohibit certain acts or conduct, and enforce such prohibitions by imposing criminal sanctions.

I

The power of the Federal Government with respect to any matter which may be within its competency varies with the subject upon which it is exerted.

We respectfully submit that the power of the Federal Government to deal with any subject is not always a given quantity, which may be reduced to a formula applicable alike to all cases. On the contrary, at least some of the powers of necessity vary with the subjects to which it is attempted to apply them. Without going into an extended discussion of the subject, it may be said without fear of contradiction that there are three gradations in the right of the Federal Government to exercise certain powers within its constitutional competency,—the degree of power of the Federal Government being in inverse ratio to the interest of the States in the matter and the possible invasion of their rights. And this, in turn, depends upon the manner in which the power of the States with respect to the subject-matter is reserved or protected in the Constitution.

Limiting the discussion to the Commerce Clause, the greatest exertion of federal power is allowed in the matter of the *regulation* of commerce as such,—the establishment of business rules or commercial norms. The reason therefor is obvious: there is no *grant* or *express* reservation of power

in the Constitution to the States over *intra*-state commerce. Intra-state commerce is nowhere referred to in the Constitution, and is a mere *residuum* of general commerce after that portion which is foreign and interstate has been taken out. The States have no special interest in the regulation of commerce, in the sense of possessing a right *vis-a-vis* the Federal Government. Commerce is a matter of constant flux and increasing complexity. What is local today may become national tomorrow. The national power therefore, of necessity, keeps on increasing, and the residuum of necessity as constantly diminishes.

But the matter stands differently when the regulation exerted by the Federal Government impinges upon the fundamental powers of state government, the most important of which is the control of crime. In such a case the Federal Government is not as free to act as it would be in a case which involves mere regulation,—such, for instance, as rate-making. But not all crimes are alike: *It is our contention that there is a distinction between crimes which do not involve the use of force or violence and those which do.* And the reason for it is this: While it cannot be doubted that the police power belongs to the States, it is nevertheless true that the police power is merely a *reserved power*, while the power to deal with force and violence *is expressly guaranteed to the States, by the Federal Government being expressly excluded from it.* That there is a difference between an express constitutional provision and a merely implied or reserved one was recognized as early as 1808 in the Massachusetts *Embargo Case*.

U. S. v. *Brigantine William*, 2 American Law Journal 264.

II

For a century and a quarter of the existence of the nation under the Constitution Congress has scrupulously limited its legislation dealing with crime as to such matters withdrawn by the Constitution from the competency of the several States.

We respectfully submit that an examination of the history of the criminal legislation of Congress will reveal the fact that, at the very outset of our national existence under the Constitution, Congress adopted the policy of legislating upon crime as such only in matters which the Constitution has placed within the *exclusive* jurisdiction of the Federal Government,—matters as to which *the States were incompetent to legislate*.

Such was clearly the nature of the first Federal Crimes Act, adopted in 1790. (First Congress, Second Session, Chapter 9.) That Act dealt with three subjects only,—all expressly placed within the exclusive jurisdiction of the Federal Government by the Constitution: (1) Treason; (2) piracy and other crimes on the high seas; (3) crimes committed in places on land within the exclusive jurisdiction of the Federal Government, such as forts and arsenals. In speaking of that Act in the famous *Guiteau Case*, Mr. Justice James said:

> "'The Congress shall have power * * * to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may by cession of particular States, and the acceptance of Congress become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.' Art. 1, section 8.
>
> "It will be observed that, in designating the places in which the commission of murder should be deemed

a crime against the United States, the legislature employed substantially, and to some extent, precisely the language found in that clause of the Constitution which conferred upon it the power to exercise exclusive legislation over certain places. It was the duty of the legislature to provide at some time for the cases thus committed to its power by the Constitution, and it is to be gathered from the similarity of the language of the statutes and of the clause of the Constitution referred to, that the legislature intended to perform *that duty* at once, in organizing the machinery of the new government." (Italics supplied throughout unless otherwise stated.)

U. S. v. *Guiteau*, 1 Mackey 498, 528.

The policy thus adopted by Congress of not dealing with crime as such except in matters withdrawn from the competency of the States, has, we respectfully submit, been strictly adhered to for a century and a quarter after the organization of our Government under the Constitution,—that is to say, during five-sixths of our national existence. We do not claim to have examined every Act of Congress before reaching this conclusion. But we have followed every clue that would throw light on the subject, and have found no instance which would militate against our conclusion, and everything that bears on the subject that we could find confirms it.

The first general revision of the federal criminal law by Congress occurred in 1825 (Laws of 1825, Ch. 65). And an examination of that Act shows that it deals with the same class of subjects as those dealt with in the Crimes Act of 1790,—namely, matters withdrawn by the Constitution from the competency of the several States. The other general revisions were merely in the nature of codification. And we do not know of any case indicating a departure from that policy until the adoption of the Larceny Act of 1913 (Ch. 50, Laws 1913; now Section 409, Title 18, U. S. C. A) discussed in our main brief.

That Act was a radical departure from the policy ad-

hered to for a century and a quarter. But while Congress did venture to legislate on the subject of crime as such under the power to regulate interstate commerce, it still kept out of the sphere *expressly reserved to the States and guaranteed against invasion by the Constitution,—that of force and violence*. And the same is true of the Embezzlement Act of 1914 (Ch. 323, Laws 1914; now Section 412, Title 18, U. S. C. A.). And as far as we could discover, no attempt was ever made by Congress to deal with force and violence in any sphere not withdrawn by the Constitution from the competency of the several States until the adoption of the Act here under consideration.

And, we respectfully submit, that an examination of another phase of the subject, that dealing with the problem of double jeopardy, conclusively demonstrates that in enacting the present Act Congress believed itself to be dealing with a matter not within the competency of the several States; *and the Act must, therefore, be construed accordingly.*

III

Congress has never defined a crime over which another government had concurrent jurisdiction without providing against double jeopardy.

We respectfully submit that an examination of the history of our subject conclusively establishes the fact that whenever Congress has defined a crime over which another government had, or could have, concurrent jurisdiction it was careful to provide against double jeopardy.

The first such occasion arose when Congress enacted the Crimes Act of 1825, which, in addition to piracy, dealt with crimes committed in American ships lying in a river or harbor within the jurisdiction of a foreign state.[3] Section

[3] Piracy, dealt with in the Crimes Act of 1790, was not such an occasion, since piracy comes under the Law of Nations, which is part of our Constitution, and protection against double jeopardy in piracy cases is part of the Law of Nations. And it was so held by this Court in the Piracy cases cited and discussed in our main brief.

5 of that Act provided that any offense committed on board any ship belonging to a citizen of the United States, lying within the jurisdiction of any foreign state, by a member of the crew or passenger, or a similar person, is punishable in the courts of the United States as if committed on the high seas. Having thus defined a crime which is cognizable in another jurisdiction of *equal* competency, the same section provided against double jeopardy, as follows:

> "Provided, always, that if such offender shall be tried for such offense, and acquitted or convicted thereof, in any competent court of such State or sovereign, he shall not be subject to another trial in any court of the United States."

During the eighty-eight years which elapsed between the enactment of the Crimes Act of 1825 and the Larceny Act of 1913 there was no occasion, as far as we could ascertain, for any similar provision against double jeopardy. The Larceny Act of 1913 for the first time brought the criminal jurisdiction of the Federal Government into a sphere over which the States had theretofore exercise jurisdiction. Congress was therefore for the first time faced with the fact that under our Constitution whenever Congress legislates constitutionally with respect to interstate commerce that *eo ipso* deprives the State Governments of their competency to further act in any way in the matter, *unless their power to act is expressly reserved by Congress.* Congress did not, of course, intend to revolutionize our legal-constitutional system. It therefore specifically provided for concurrent state jurisdiction by the States. And having provided for concurrent jurisdiction by the States, it also provided against double jeopardy. And it did exactly the same thing in the Embezzlement Act of 1914. Each of these Acts contains an express provision for concurrent jurisdiction in the States followed by a provision declaring that—

> "a judgment of conviction or acquittal on the merits under the laws of any State *shall be a bar to any prosecution hereunder for the same act or acts.*"

The significance of these provisions of the two Acts is a double one: First, it conclusively establishes the fact that when Congress believes itself to be dealing with interstate commerce in a manner to cover acts within the competency of the several States it is careful to save their power to deal with such crimes. And, second, that when it deals with a subject over which the States theretofore had jurisdiction, *and it intends to preserve that jurisdiction*, it provides against double jeopardy.

IV

The "commerce power" comprises various things which must be sharply differentiated.

Counsel for the Government say in this portion of their brief—

> "Moreover, Congress has, under its commerce power, provided in *several instances* for the punishment of *acts of violence* and the constitutionality of such legislation has never been seriously questioned."

We shall see further below that the assertion contained in the italicized words,—like the report of the death of a certain famous man,—is somewhat "exaggerated". At this point, however, we are interested in our own assertion that the first instance of Congressional legislation dealing with crime as such in a field which was not withheld by the Constitution from the competency of the several States was the so-called Larceny Act of 1913. The Government brief apparently proceeds upon the theory that everything that is comprised under the "commerce power" may be thrown into one pot,—that all the legislation under the commerce clause of the Constitution belongs in the same

field; and that, therefore, all the cases decided under the commerce clause can be cited indiscriminately when dealing with any other part of this field. Such is clearly not the case. And one of the first distinctions to be drawn is that between foreign commerce and interstate commerce: Notwithstanding the fact that the power of Congress is exclusive in both fields, in practice there is a vast difference between the two fields, as an examination of the cases clearly demonstrates. And that is why in our discussion of the subject in our main brief we have been careful to speak of interstate commerce rather than of the "commerce power", which includes the power over both interstate and foreign commerce. Not that Congress ever consciously attempted to deal with crime as such in foreign commerce during the first century and a quarter of the existence of our nation under the Constitution. But there is one case, which we had to bear in mind in that discussion, in which this Court had said that the source of the power of Congress in enacting a certain criminal statute was the "commerce power". We have in mind the case of

United States v. *Coombs*, 12 Pet. 72.

That case arose under Section 9 of the Act of 1825. That section is now Section 488 of Title 18, U. S. C. A.; and is part of Chapter 12, of that title, which is headed: "Piracy and Other Offenses Upon Seas." The section read and still reads as follows:

> "Whoever plunders, steals, or destroys any money, goods, merchandise, or other effects from or belonging to any vessel in distress, or wrecked, lost, stranded, or cast away, upon the sea, or upon any reef, shoal, bank, or rocks of the sea, or in any other place within the admiralty and maritime jurisdiction of the United States, shall be fined not more than $5,000 and imprisoned not more than ten years; and whoever willfully obstructs the escape of any person endeavoring to save his life from such vessel, or the wreck thereof; or whoever holds out or shows any false light, or extinguishes any true light, with intent to bring any

vessel sailing upon the sea into danger or distress or shipwreck, shall be imprisoned not less than ten years and may be imprisoned for life."

U. S. Code, Title 18, Sec. 488.

The defendant in the *Coombs* case had been indicted for alleged stealing of certain articles "belonging" to a distressed vessel. He had, as a matter of fact, not taken the articles from the vessel, but had picked them up on the beach to which they had been washed up by the sea; and the difficulty in the case arose from the fact that he had picked them up above high-water mark. It had previously been held by this Court that the "high sea", and with it the admiralty jurisdiction of the federal courts, is bounded by high-water mark. Coombs was therefore out of federal jurisdiction if that jurisdiction depended upon the provision of the Constitution giving the Federal Government jurisdiction in admiralty and the power to punish crimes on "the high seas". The matter of "plunder" above high-water mark was important. And at the same time there was not, *and could not be*, any state law which would deal with the subject. The crime of larceny is defined as "taking from the possession of the true owner, or another". Clearly, therefore, picking up of castaway articles is not larceny. In fact, as appears from Blackstone's discussion of the subject, and from some of the adjudicated cases, the plundering aimed at was an honored occupation in many countries. The situation was the more serious since the Government could seldom prove just where the plundered article had been picked up. Clearly, this was a situation where "there ought to be a law". And, of course, it had to be a *federal law*. And that not only because the States were clearly incompetent to deal with the subject, but also because the existence of two laws, one operating below high-water mark and one above high-water mark, would be almost as bad if not actually worse than none at all. Under these circumstances, this Court found a way out by finding the source of power of the Act in so far as

it applied to this particular situation (the rest was, of course, within "admiralty" and "high seas"), in the constitutional provision for the regulation of foreign commerce. That Congress itself, in enacting the law, had no intention to draw upon the "commerce power", but believed itself to be acting under the "admiralty power" of the Federal Government, is obvious. Nor was there any question of the invasion of the powers of the States, since the Court was merely transferring the source of power from one *exclusive* field to another *exclusive* field,—both the admiralty power and the power over foreign commerce being within the "exclusive" jurisdiction of the Federal Government, in the sense that the States are never competent to deal with either of these subjects.

Brown v. *Maryland*, 12 Wheat. 419.

V

Moore v. *Illinois*—its cause and cure.

Government's counsel in their brief dispose of the entire problem of double jurisdiction by the assertion that "it is elementary that federal legislation under the commerce power is not a bar to complementary state legislation in the same field unless Congress has manifested a purpose to preempt the entire field",—without citing a single case as authority for their assertion. As we shall see further below, this assertion is also somewhat "exaggerated",—to put it mildly. But more important than that is the fact that we are not dealing with "complementary" but with identical legislation. Before, however, discussing this aspect of the case we must dispose of another old case,—on which the Government leaned heavily in the court below, but which, for some reason best known to Government counsel, is not mentioned in their brief in this Court. We consider a discussion of that case necessary both in the interest of clarity and historical accuracy.

In discussing this subject in our main brief we referred to the exceptional and anomalous position of our constitutional law under the Prohibition Amendment in the special field covered by that Amendment. We must now refer to another exceptional and anomalous condition of our constitutional law in a special field during another brief period of our history,—the unfortunate period when the tranquillity of our country and the symmetry of our constitutional law was disturbed by congressional fugitive slave legislation. It was that legislation that gave rise to the case which we desire to discuss briefly.

Moore v. *Illinois*, 14 How. 13.

In the court below, Government Counsel leaned heavily on that case as alleged authority for the proposition that under our constitutional system both governments, Federal and State, might legislate on the same subject by defining and punishing the same crimes. *Moore* v. *Illinois* does seem to hold such doctrine, *with respect to the question of the rendition of fugitive slaves.* But upon examination it will be found that the reason for that holding is the same as that of the cases under the Prohibition Amendment,—namely, the contention that *the Constitution itself legislated on the subject by commending the rendition of fugitive slaves, and that both governments were in duty bound to carry out that mandate.*

We need not go here into the question as to whether or not that contention was justified. Suffice it to say that such was the theory upon which that decision proceeded. But it is important to point out that theory led, for the brief period during which it prevailed, to the same kind of confusion, in its own field, as that which later prevailed, under the Prohibition Amendment in the field covered by that unfortunate experiment in constitution making. Fortunately, both of these episodes of our history are part of the dead past.

VI

Congress has never before legislated on crimes of violence in interstate commerce. Nor on crimes of violence in foreign commerce as a means of regulating the same.

We have quoted the passage of Government counsel's brief wherein they make the sweeping assertion that Congress has, "under its commerce power", "provided *in several instances* for the punishment of acts of violence",—and have observed that the assertion is "somewhat exaggerated". In a footnote, Government counsel list, in substantiation of their assertion, the Larceny Act of 1913; the so-called Lindbergh Act of 1932; and Section 381 of Title 18 of the United States Code, which was taken from the Act of June 15, 1917. The first two laws have been discussed by us in our main brief. It is only necessary here to call attention to the fact that the Larceny Act *does not deal with violence;* and that the Lindbergh Law deals with cases in which interstate commerce *is used as a means of the commission of the crime,* which, as pointed out in our main brief, is an entirely different subject.[4] There remains, therefore, only the Act of June 15, 1917. "Several instances" have thus, upon mere inspection, dwindled to one. But upon further scrutiny it will be found that this one "instance" is a highly questionable one,—in fact, it is a non-existent one.

To begin with, the section of the Act of June 15, 1917, referred to, does not deal with *interstate* commerce, but with *foreign* commerce; and, as already pointed out, foreign commerce is an entirely different matter. But, upon further examination, it will be found that even insofar as *foreign* commerce is concerned, that section of the Act of

[4] In fact, it is our contention that in passing the Anti-Racketeering Act, Congress believed itself to be dealing, and *intended to deal*, with situations similar to those covered by the Lindbergh Law, which was amended as part of the legislative program of which our Act was a part.

1917 is not a *regulation* under the "commerce power", but a war measure intended to attain a specific object and limited to that object. The Act, of which the section in question is a part, is entitled:—

> "An Act to Punish Acts of Interference With the Foreign Relations, the Neutrality and the Foreign Commerce of the United States, to Punish Espionage, and Better to Enforce the Criminal Laws of the United States, and for other Purposes."

It is thus clear, from the very title of the Act, that while it may touch upon foreign commerce, it was a war measure enacted under the War Powers of Congress, and its power to deal with Foreign Relations. That incidental regulation of foreign commerce may occur in the course of the use of other powers of the Federal Government is, of course, undisputed. And it has been so decided by this Court:

United States v. *Marigold*, 9 How. 560.

What the real *intention* of Congress was in enacting the particular section of that Act is evident upon a mere inspection thereof. It reads:

> "Whoever, *with intent to prevent*, interfere with, or obstruct or attempt to prevent, interfere with, or obstruct, *the exportation to foreign countries* of articles from the United States, shall injure or destroy, *by fire or explosives*, such articles or the places where they may be while in such foreign commerce, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."
>
> *Act of June 15, 1917, Title IV, Section 1.*

It will thus be seen that it does not deal with violence in foreign commerce *generally*, but with a particular kind of violence. And a reading of this Section in connection with the entire Act clearly demonstrates that the purpose and intent of the Act was not to prevent violence in for-

eign commerce, but to prevent the kind of violence which would affect our *foreign relations*, and the war effort in which we were then engaged. It was a war statute designed to prevent sabotage in munition factories, munitions being needed for our own war effort as well as that of our Allies. That is why it was limited to exportation, and did not include importation.

But even more important than the question whether this statute should be considered one under the "commerce power", or under the war power of the Federal Government, is the fact that, clearly, *the kind of violence* covered by that section is such that the States were clearly incompetent to deal with it. For it should be noted that the statute does not deal with violence committed generally in foreign commerce, or in that part of foreign commerce which constitutes exportation, but with violence performed *for a particular purpose and with a particular intent*. No one could be punished under the Act, unless that purpose and intent were present. *And the proof of that purpose and intent would take it out of the domain of the competency of the States*,—for it would bring it within the exclusive power of the Federal Government, whether that be the war power, the power to conduct our foreign relations, or the *regulation* of foreign commerce.

But even more significant than the origin and content of that Act, is its subsequent history *in connection with the very Act here under consideration*. For it has such a history. And that history is this:

Among the bills introduced simultaneously with the bill which became the Act here under consideration, and as a part of the Legislative Program of which our Act was a part, there was introduced the following bill,—which immediately preceded *our* bill on that "Program":

> "Be it enacted, etc., That section 1, title IV, act of June 15, 1917 (U. S. C., title 18, sec. 381) be, and the same is hereby, amended to read as follows:
>
> 'Violent interference with foreign or interstate commerce.—Whoever, with intent to prevent, interfere

with, or obstruct or attempt to prevent, interfere with, or obstruct *the transportation of articles to or from the United States or from any State*, Territory, or the District of Columbia, *to any State*, Territory, or the District of Columbia, shall injure, or destroy, by fire or explosives, *or otherwise*, such articles or the place or places where they may be while in such foreign or *interstate commerce*, shall be fined not more than $10,000 or imprisoned not more than 10 years, or both." (Cong. Rec., Vol. 78, p. 457; Materials, p. 52).

In other words, it was intended to convert the wartime Act against sabotage of munitions (which is the reason for *limiting* the cause of destruction or injury to "fire or explosives" as a means) into a general statute against the violent destruction of property in foreign and interstate commerce. *But Congress refused to pass this bill, and it never became a law.*

This, we respectfully submit, clearly indicates that Congress did not intend to deal with the crime of violence *in* interstate commerce. But, as pointed out in our main brief, Congress clearly intended to deal with violence similar to the violence involved in the Kidnapping Act,—that is to say, with crimes *in which interstate commerce is used as a means of the commission of the crime.*

VII

There is a basic difference between civil and criminal statutes with respect to the power which may be exercised by the Federal Government under the commerce clause.

We have already pointed out in our main brief that there is a basic difference with respect to the powers which may be exercised by the Federal Government under the commerce clause, between civil and criminal cases, because of the Constitutional provisions with respect to double jeopardy. But there is another difference which

must be pointed out, in view of the decision of the Circuit Court of Appeals for the Eighth Circuit, in the case of *Nick* v. *United States*, cited but not discussed by counsel for the Government. A reading of the opinion of the Court in that case would indicate that the questions which we have raised were never raised in that case, and certainly were not discussed. In fact, a reading of that portion of the opinion in that case which deals with the problem of unconstitutionality would indicate that the Court *assumed* that the States would be ousted of jurisdiction with respect to the crime of extortion in interstate commerce, and that the only thing that the Court worried over was whether Congress had the power to do so.

In answering that question in the affirmative, the Court relied on the decisions of this Court in the cases validating the National Labor Relations Act. And in doing so, the Court overlooked,—probably because its attention was not called to it,—the fundamental distinction between civil and criminal cases, aside from the difference between the language of the two Acts under consideration. Overlooking the "in any way or in any manner" of our Act,[5] which would cover all the commerce of the United States, and assuming that the Act here may constitutionally be construed to be limited to commerce coming within the purview of the National Labor Relations Act, it is evident that cases arising under the two Acts are of an entirely different *nature*, and would of necessity have entirely different *effects* upon the jurisdiction of the States in the premises.

Without attempting to labor the obvious, it is sufficient to illustrate the difference between the two situations by a reference to what has actually happened to the competency of the States under the National Labor Relations Act, in the particular domain to which that Act is limited.

[5] It should be noted that our Act does not only cover any *extortion* which "in any way or any manner" *affects* interstate commerce, but extortion committed "in connection with" any *act which* "in any way or any degree" affects interstate commerce.

As is well known, some of the States have followed the example of the National Legislature, and have passed Labor Relations Acts of their own. Those States that have not followed the example were, of course, not affected by the existence of the National Labor Relations Act, for it covered a domain in which they were apparently not interested. But what happened to those States which were interested in the subject, is of interest here. We therefore respectfully call the attention of this Court to what happened in the State of New York,—a situation with which we are familiar.

When the Legislature of the State of New York came to deal with the subject, it was naturally confronted with the fact that there *was* a National Labor Relations Act; and that if the State of New York were to pass a similar Act infinite confusion would arise, even if it expressly limited its operation to *intrastate* commerce, since the word "affect", contained in the National Labor Relations Act, would, of necessity, throw the subject into confusion, unless something were done to avoid it. The New York State Legislature therefore enacted a special section entitled "Application of Article", which reads as follows:

> "The provisions of this article shall not apply to the employees of any employer *who concedes* to and agrees with the board that such employees are subject to and protected by the provisions of the *national labor relations act, or the federal railway labor act* * * *"

(Labor Law [N. Y.], Section 715.)

In other words, the State of New York waived its jurisdiction in favor of the United States in any case where the employer,—the only one who could object,—raised the point that the existence of the National Labor Relations Act ousted the State of New York from jurisdiction.

But, clearly, no such provision would be of the lightest use or value in the field covered by the Anti-Racketeering Act,—even if we were to assume that the States would be

willing to waive their jurisdiction in favor of the United States in all extortion cases in which interstate commerce may be "affected". For, obviously, the consent of the defendant in a criminal case cannot be obtained by the simple expedient of asking him whether he concedes that the crime committed by him comes within the purview of the Federal Anti-Racketeering Act. *A defendant in a criminal case has a right to stand mute.* He cannot therefore be asked by the courts of which government he prefers to be tried. His preference is not to be tried at all; and he has a right to refuse to answer. And when brought into the courts of either government to maintain that it is the other that has jurisdiction. Furthermore, his taking the position in the one court, and getting a ruling in his favor, *would not prevent him from contending to the contrary when brought into the other jurisdiction.*

This, we respectfully submit, is really elementary, and needs no citation of authority. But if it should be questioned by counsel for the Government we should be glad to discuss it further.

VIII

The Anti-Racketeering Act is substantially identical with the extortion laws of the various states.

Aside from the question as to whether or not there can be such thing as "complementary legislation" by the States in the domain of foreign or interstate commerce, it is a sufficient answer to the theory of the prosecution, that the Anti-Racketeering Act is *substantially identical* with the extortion laws of the various States. Without going into an elaborate examination of the extortion laws of the various States, it is sufficient to point to the statement of Government counsel in their brief in the Court below, before they had devolved the "complementary legislation" theory now being pressed by them upon this Court. The

section of the Government brief in the Court below dealing with the constitutionality of our Act commenced with the following paragraph:

> "The Court below instructed the jury in substance, as has been stated, that they could find the defendants guilty under this Act, if they found that they had conspired to obtain payments from interstate truckers, which were not wages, by use of or attempt or threat to use force, violence or coercion, or by consent induced by wrongful use of force or fear. *Thus the Act is applicable in this case to make extortion directly against interstate transportation by motor truck a federal crime.*"

And the footnote appended to this paragraph read as follows:

> "*Extortion* is expressly made the subject of other Federal statutes involving the exercise of the commerce and other powers (18 U. S. C. Secs. 171; 338a, 408d, 408e). *The statutory crime of extortion in this State is provided in the New York Penal Law, Sec. 850.*"

Having thus conceded the identity of the Anti-Racketeering Act with the New York State law dealing with extortion, Government counsel proceeded to make the bold assertion that the two Governments *could occupy the same ground*. But unlike the Government counsel on the present brief, they were careless enough to cite cases, instead of merely asserting that their proposition was so elementary as not to require the citation of authority. It was in this connection that they cited the case of *Moore* v. *Illinois*, discussed above. And *Moore v. Illinois* is not the only case cited in that brief which Government counsel failed to cite on the present brief: they failed to cite all the other cases, eight in number, which were cited on that brief as allegedly supporting the theory upon which this case was decided in the District Court, and upon which it was sought to be sustained in the Circuit Court of Ap-

peals. We do not propose to let it go at that,—for the reason that those cases, although cited for the contrary proposition, completely demonstrate the correctness of our proposition that two governments *cannot* occupy the same ground, and also that there is no such thing as "complementary legislation" *in the domain of the criminal law.*

One of the cases cited in this connection is *United States* v. *Coombs*, already discussed. Another one is that of *United States* v. *Lanza* (260 U. S. 377), which was decided under the Prohibition Amendment. An examination of the other six cases,—taken from various fields, and covering nearly a century in point of time,—leads, by various ways, to the same result: the establishment of the principle, which may be said to be the common denominator of them all,—namely, *that there can be no two laws, one Federal and one State, governing the same subject.*

It would extend this brief unduly if we were to examine all those six cases. We shall therefore examine the three most important ones, and cite the other three, for the use of anyone who may care to examine further into the subject.[6]

The earliest case in point of time is that of *Fox* v. *Ohio*, 5 How. 410. In that case, plaintiff, in error, the defendant below, had been indicted in the courts of the State of Ohio, for *passing* counterfeit coin. His appeal to this Court was based on the contention that the subject of dealing with counterfeit coin had been placed by the Constitution within the purview of the Federal Government, and that there was a federal statute governing the subject. The lower court was divided in opinion. This Court decided against the defendant's contention by a divided court,—Mr. Justice McLean writing a very able dissenting opinion. It is not, however, Mr. Justice McLean's dissenting opinion that we rely on here, *but the opinion of the majority, insofar as it concurred with Mr. Justice McLean's opinion.* For this Court was unanimous on the proposition *that the two*

[6] *United States* v. *Marigold*, 9 How. 559; *Ex parte Siebold*, 100 U. S. 371; *Crossley* v. *California*, 168 U. S. 640.

Governments could not legislate on the same subject. The division of opinion being as to whether or not the two subjects were the same, the majority of the Court believed that the two statutes defined two *different crimes.*

It may be noted here, that the case was argued on behalf of the State of Ohio by one of the ablest lawyers of his time, Mr. Henry Stanbery, then Attorney-General of the State of Ohio and later Attorney-General of the United States; and that he wrote a most elaborate brief in support of his contention, which was adopted by this Court, that the two crimes *were utterly different in their nature.* Indeed, in the opinion of this Court not only was the crime defined by the state statute different from any crime defined by the Federal law, but that the crime of which the defendant had been convicted was of a kind that the Federal Legislature was *incompetent* to deal with. This is evident from the following statement in the opinion of the majority of this Court:

> "The punishment of a cheat—said this Court—or a misdemeanor practised within the State and against those whom she is bound to protect, is peculiarly and appropriately within her functions and duties, and *it is difficult to imagine an interference with those duties and functions which would be regular or justifiable.*"
>
> *Fox* v. *Ohio*, 5 How. 410, 434.

The next case which we shall consider here is that of *Cross* v. *North Carolina*, 132 U. S. 132. That case involved the conviction of officers of a national bank for forgery in having forged certain promissory notes which they then accepted as genuine for the bank, pocketing the proceeds. The appeal to this Court was based on a contention that the Act in question also constituted a crime under a federal statute which made a false entry by an officer of a national bank on the books of the bank, *with intent to deceive the national bank examiner*, a criminal offense. It was argued that since the same act could not be *punishable* under the statutes of both the Federal and State Governments, the

presence of the federal law on the statute books made the State law unconstitutional. That contention was rejected by this Court, *but only upon the ground that the offenses defined by the two Acts were entirely different, and that the crime under the State Act was complete without the commission of the federal offense.*

In the course of his opinion on behalf of this Court, Mr. Justice Harlan said:

> "*The fallacy of this argument is in assuming that the offense described in section 5209 of the Revised Statutes*, namely, the making, by an officer or agent of a national banking association, of a false entry in its books, reports or statements, with intent to injure or defraud the association, or others, or with the intent to deceive its officers or any agent appointed to examine its affairs, necessarily *involves the crime of forgery, of which the defendants were found guilty. If the notes in question had not been forged*, but, with or without the consent of the obligors, had been temporarily placed by the defendants among the assets of the bank, and entered upon its books, when they were not its property, with intent to deceive the agent appointed to examine its affairs, *they could have been punished under section 5209. On the other hand, the crime defined in section 1029 of the Code of North Carolina would have been complete if the defendants simply made and forged*, or caused to be made and forged, or willingly assented to the making or forgery, of *the notes described in the indictment, with intent to defraud, and did not follow it up by committing the crime against the United States* of making false entries in respect thereto upon the books of the bank, with the intent to deceive the agent designated to examine its affairs."

Cross v. *North Carolina*, 132 U. S. 132, 137, 138.

The last case which we shall note here,—the latest in point of time of the cases cited by the Government in their brief below,—is that of *McElvey* v. *U. S.*, 260 U. S. 353. That case involved an indictment under a federal

statute which prohibited the obstruction of free passage through unoccupied public lands. It was claimed that the offense as proved at the trial consisted of an assault; and that assault was a crime cognizable in the State courts. But this Court did not reply by the short and decisive, if slangy retort, "*So, what?*" Instead, this Court, speaking through Mr. Justice Van Devanter, went into an elaborate exposition of the law of the subject, *in order to establish the proposition that the federal offense for which the defendants had been convicted was not the same for which they could have been convicted in the State courts; that the assault was not necessary to the commission of the federal offense, which could have been committed by the mere setting up of a fence, and was not therefore the offense of which the defendant was convicted.*

Those cases prove that for the space of a century this Court has consistently affirmed the proposition that there can be no two laws, one Federal and one State, on the same subject. And we confidently assert that a search of the adjudicated cases decided before *Fox* v. *Ohio* and since *McKelvey* v. *U. S.* will fail to disclose a single case (always excepting *Moore* v. *Illinois*, and *U. S.* v. *Lanza*, one dealing with the Fugitive Slave Law, and the other with Prohibition), which holds to the contrary.

IX

There can be no "complementary State legislation" to Federal legislation regulating interstate commerce.

In our main brief we commenced the discussion of the problem of the constitutionality of the Anti-Racketeering Act by stating two basic propositions,—namely, (1) that the Federal Government has no general police powers, and (2) that the power of the Federal Government to regulate interstate commerce is exclusive. We did not desire to labor the obvious, and therefore limited ourselves to the citation

of a number of cases, without, however, quoting from the opinions in those cases. And, as far as the second proposition was concerned, we thought it best not to cite such well-known cases as *Gibbons* v. *Ogden* and *Brown* v. *Maryland*, which state the law in general terms, but rather borderline cases, so as to show the line of demarcation between the reserved police powers of the States and the regulatory power expressly conferred upon the Federal Government. This was supplemented by the citation of a number of cases, followed by quotations from the opinions in two of them, on what might be called the *incidence* of the rule of "occupation" by the Federal Government. Counsel for the Government chose to ignore all of these cases. Instead, they laid down the general rule quoted above, which, they say, is so elementary as to require no citation of authority. Since this question lies at the very heart of the problem of constitutionality involved in this case, we must quote again verbatim this statement of Government counsel. They say, at page 51 of their brief—

> "But it is elementary that federal legislation under the commerce power is not a bar to *complementary* state legislation in the same field unless Congress has *manifested a purpose to preempt the entire field.*"

This will come as startling news to students of the subject. And it imposes upon us the duty of discussing the subject at greater length than we thought necessary when writing our main brief. As we understand the law of our subject it may be summarized as follows:

1. The power of Congress to *regulate* interstate commerce is exclusive; and the States are *never* competent to pass legislation to *regulate* that commerce.

2. The Constitutional power of the Federal Government to regulate interstate commerce does not touch the *Police Power* of the States; which is entirely reserved to the States and extends to matters in interstate commerce as

well as to other matters. The Police Power may not, however, be used as a cloak for the *regulation* of interstate commerce, or in any way to actually *regulate* that commerce.

3. The power of the Federal Government to regulate interstate commerce is *superior* to the Police Power of the States; and the latter is therefore ousted whenever it comes into conflict with the Federal power to regulate commerce.

4. Whenever, therefore, Congress has legislated in a given field, the States lose their police power even in cases where the regulation of commerce is only remote, since the federal power to regulate commerce is *co-extensive with the subject matter involved* and tolerates no interference whatsoever.

5. The Federal Government may expressly limit the field which it intends to occupy; and it may either expressly or by such limitation of its own legislation leave room for the continued operation of the police power of the States to the extent that it may deem desirable.

In this respect the field of interstate commerce is different from the field of ordinary criminal law, since the same act may constitute two different crimes when viewed in two different aspects, and the two different crimes may be within the domain of the two separate governments, while *regulation is entire and indivisible.* So, for instance, taking the case of *Fox* v. *Ohio* as an example, the two problems referred to by the majority of this Court,—that of protecting the Government of the United States and that of protecting the individual citizens of the States,—may be considered as two separate fields of legislation, one within the domain of the one government and the other within the domain of the other, even when they are combined in one transaction. For, the punishment of the crime

of defrauding individuals may be handled by the States without in any way trenching upon the power of the Federal Government to punish the crime of counterfeiting its coin. But when we come to *regulation*, a state regulation may not be *added* to a federal regulation without interfering with the latter. For each regulation must be considered the *limit* of the regulation which the government prescribing it considers necessary, so that even when there is no regulation by one of the governments it may, and sometimes *must*, be considered that that government desires the subject matter to remain *free* of regulation, freedom from regulation itself being a *mode of regulation*.

We take it that it is not necessary before this Court to enter into extensive citations of authority on the propositions stated above. But we must, in view of the circumstances, quote at least from the three cases cited by us in our main brief in their substantiation.

The first case cited by us in our main brief in this connection is that of *Sherlock* v. *Alling*, 93 U. S. 99. The decision in that case, as given by the reporter's headnote, succinctly states the rule of law as developed by this Court in the fifty-odd years which had elapsed between the decision in *Gibbons* v. *Ogden* and the case cited. That rule is stated thus:

> "The action of Congress as to a regulation of commerce, *or the liability for its infringement*, is exclusive of state authority; but, until some action is taken by Congress, the legislation of a State *not directed against commerce or any of its regulations*, but relating generally to the rights, duties and liabilities of citizens, is of obligatory force within its territorial jurisdiction, although it may *indirectly* and *remotely* affect the operations of foreign or interstate commerce, or persons engaged in such commerce."
>
> *Sherlock* v. *Alling*, 93 U. S. 99.

And in the opinion delivered by Mr. Justice Field in that case for a unanimous Court, the rule is thus elaborated:

"The power to prescribe these and similar regulations necessarily involves the right *to declare the liability which shall follow their infraction.* Whatever, therefore, Congress determines, either as to regulation *or the liability for the infringement*, is exclusive of state authority. But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. * * * And it may be said, generally, that the Legislation of a State *not directed against commerce or any of its regulations*, but relating to the rights, duties and liabilities of citizens, and only *indirectly* and *remotely* affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit. In our judgment, this Statute of Indiana falls in this class. Until Congress, therefore, makes *some* regulation *touching* the liability of parties for marine torts resulting in the death of the persons injured, we are of the opinion that the Statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased, and that, as thus applied, it constitutes no encroachment upon the commercial power of Congress."

Sherlock v. *Alling*, 93 U. S. 99, 104.

The second case cited by us was that of *Bowman* v. *Chicago & Northwestern Railroad Co.*, 125 U. S. 465. That case was one of the early state prohibition cases, the statute involved being an Iowa statute which attempted to forbid the bringing into the State of intoxicating liquors, the manufacture and sale of intoxicating liquors having been prohibited by its laws. The constitutionality of state prohibition laws generally had been upheld by this Court as a proper exercise of the police power.

Mugler v. *Kansas*, 123 U. S. 623.

The question before the Court was whether, in view of this acknowledged power of the states to regulate the sale of intoxicating liquors as injurious to the health, morals, peace and good order of the community, the State could stop the importation of the forbidden articles into the State, in the same way as it could stop the importation of diseased animals. The answer of this Court was in the *negative*, since the relation of commerce was a *direct* one, *even though the purpose of the act was not to regulate commerce*. In delivering the opinion of this Court in that case Mr. Justice Matthews commenced by setting out the purpose of the Act, which was *not* regulatory, saying:

> "It thus appears that the prohibitions of the statute set out in the plea, prohibiting the transportation by a common carrier of intoxicating liquors from a point within any other State for delivery at a place within the State of Iowa is intended to more effectually carry out the general policy of the law of that State with respect to the suppression of the illegal manufacture and sale of intoxicating liquor within the State as a nuisance. It may, therefore, fairly be said that the provision in question has been adopted by the State of Iowa, not expressly for the purpose of regulating commerce between its citizens and those of other States, but as subservient to the general design of protecting the health and morals of its people and the peace and good order of the State, against the physical and moral evils resulting from the unrestricted manufacture and sale within the State of intoxicating liquors."

Mr. Justice Matthews then proceeded to examine in a most careful and elaborate manner the previous decisions of this Court laying down the rules governing a possible conflict between the power of the Federal Government to regulate interstate commerce and the reserved police power of the States. In the course of that discussion he referred to the opinion of Mr. Justice Catron in the License Cases, which this Court adopted as the correct rule governing our subject. In this connection Mr. Justice Matthews said:

"Speaking of the police power as reserved to the States, and its relation to the power granted to Congress over commerce, he (Mr. Justice Catron) said: 'The assumption is that the police power was not touched by the Constitution, but left to the States, as the Constitution found it. This is admitted; and whenever a thing, from character or condition, is of a description to be regulated by that power in the State, then the regulation may be made by the State, *and Congress cannot interfere.* But this must always depend on facts subject to legal ascertainment, so that the injured may have redress. And the fact must find its support in this: *whether the prohibited article belongs to, and is subject to be regulated as a part of, foreign commerce or of commerce among the states.* If, from its nature, it does not belong to commerce; or if its condition, from putrescence or other cause, is such, when it is about to enter the State, that it no longer belongs to commerce, or in other words is not a commercial article, then the state power may exclude its introduction. And as an incident to this power, a State may use means to ascertain the fact. *And here is the limit between the sovereign power of the State and the federal power. That is to say, that that which does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States.*' And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this Court in the cases of *Gibbons* v. *Ogden*, *Brown* v. *Maryland* and *New York* v. *Miln*. What, then, is the assumption of the state court? *Undoubtedly, in effect, that the State had the power to declare what should be an article of lawful commerce in the particular State; and having declared that ardent spirits and wine were deleterious to morals and health, they ceased to be commercial commodities there, and that then the police power attached and consequently the power of Congress could not interfere.*"

Bowman v. *C. & R. Co.*, 125 U. S. 465, 489, 490.

The third case cited by us was that of *Kidd v. Pearson*, 128 U. S. 1. That also was a State prohibition law case, and the decision in that case went in favor of the State with respect to the particular statute there under consideration. But the decision in favor of the State did not involve a departure from the rule stated above, but rather pointed to the true rule, that under no circumstances may a State *regulate* interstate commerce in any way or under any guise, and that a statute genuinely belonging to the police power of the State can only be tolerated, in a field which Congress *in any way touches by any legislation*, if it does not in any way affect commerce,—that is to say, *when Congress would be incompetent to legislate upon the particular matter which is the subject of State legislation.*

That case was, in a sense, a companion piece to the *Bowman Case* just considered, in that it involved the problem of manufacture of intoxicating liquors within the State for *export* in interstate and foreign commerce; and the question was whether the abatement as a nuisance of such a manufacturing plant, as an incident of the exercise of the state police power in connection with the prohibition of the manufacture and sale of intoxicating liquors, trenches upon the federal power to regulate interstate commerce. The decision of this Court was in favor of the State power, *upon the theory that manufacture was not part of interstate commerce, even if the articles manufactured were intended for export.* In other words the decision in this case was upon the same theory as, and foreshadowed the result of, the later case of

U. S. v. E. C. Knight & Co., 156 U. S. 1,

in which this Court held that manufacture for export in interstate commerce was not interstate commerce and therefore not within the prohibitions of the Sherman Anti-Trust Act.

In delivering the opinion of this Court Mr. Justice Lamar said:

"According to the theory of that great opinion, the supreme authority in this country is divided between the Government of the United States, whose action extends over the whole Union, but which possesses only certain powers enumerated in its written Constitution, and the separate governments of the several States, which retain all powers not delegated to the Union. The power expressly conferred upon Congress to regulate commerce, is absolute and complete in itself, with no limitations other than are prescribed in the Constitution, is to a certain extent exclusively vested in Congress, so far free from State action; *is coextensive with the subject on which it acts*, and cannot stop at the external boundary of a State, whenever required by the interests of commerce with foreign Nations, or among the several States. This power, however, does not comprehend the purely internal domestic commerce of a State which is carried on between man and man within a State or between different parts of the same State. * * *

Referring to certain laws of State Legislatures which had a remote and considerable influence on commerce, the court said that the acknowledged power of the State to regulate its police, its domestic trade, and to govern its own people, may enable it to legislate over this subject to a great extent; but these and other State laws of the same kind are not considered as an exercise of the power to regulate commerce with foreign Nations and among the several States, or enacted with a view to it; but, on the contrary, are considered as flowing from the acknowledged power of a State to provide for the safety and welfare of its people, and form a part of that legislation which embraces everything within the territory of a State not surrendered to the general government. Sacred, however, as these reserved powers are regarded, the court is particular to declare with emphasis the supreme and paramount authority of the Constitution and laws of the United States, relating to the regulation of commerce with foreign Nations, and among the several States; and that whenever these reserved powers, or any of them, are so exercised as to come in conflict with the free course of the powers vested in Congress, *the law of*

the State must yield to the supremacy of the federal authority, *though such law may have been enacted in the exercise of a power undelegated and indisputably reserved to the States.*"

Kidd v. *Pearson*, 128 U. S. 1, 16, 17, 18.

We respectfully submit that these cases[7] make clear two things:

First, *that under no circumstances may a State pass any law with a view to regulating interstate commerce, whether independently or as "complementary" to federal legislation.*

Second, that the incidence of the power to regulate commerce is such that whenever Congress has *in any way legislated on a particular subject* under the commerce power, that subject has been pre-empted by the Federal Government and the reserved police power of the States has thereby been ousted from that field.

These conclusions are amplified by other cases cited by us on our main brief, particularly the *DeCuir Case* and the case of the *New York Central Railway* v. *Hudson Board*, etc.

---

[7] Since the filing of our main brief, this Court has decided the case of *E. V. Parker* v. *Motor Boat Sales, Inc.* (86 Law. Ed. 251), in which this problem was touched upon. The decision rested on the conclusion of this Court that the matter there involved belonged to admiralty jurisdiction, and was therefore in a different field of "exclusiveness". But before reaching that conclusion, in answer to the argument presented in support of the decision under review, Mr. Justice Black, speaking for the unanimous Court, said:

> "If the conclusion of the Circuit Court can be supported at all, it must be on the basis that the employment, even though maritime, and therefore within an area in which Congress *could* have established exclusive Federal jurisdiction, is nevertheless subject to state jurisdiction, until Congress has exercised its paramount power. Cf. Employers Liability Assur. Corp. v. Cook, supra (281 U. S. 233). *Congress having expressly kept out of the area* in which 'recovery . . . may . . . validly be provided by State law,' *the argument may be made that Virginia would have been unhampered in providing for compensation here.*"

This should definitely dispose of Government counsel's contention that the States retain their power of legislating in the same field "unless Congress has manifested a purpose to preempt the entire field". The true rule is the other way around: Congress has preempted the entire field unless it has manifested an intention to keep out of some portion thereof, or has expressly preserved the power of the States in some such manner as it has done in the Larceny Act of 1913 and the Embezzlement Act of 1914.

X

Two criminal laws on the same subject of necessity conflict with each other.

Passing the problem of the exclusiveness of the power of Congress over interstate commerce, and assuming for the purpose of this argument that such a thing as "complementary legislation" in the field of regulation is possible, it is evident that two criminal statutes on the same subject must of necessity conflict with each other. Assuming for the purpose of this discussion that in the domain of pure legislation it is permissible, for instance, for the Federal Government to prescribe that a truck engaged in interstate commerce must have certain headlights and that the States through which the truck passed may each prescribe what kind of rear lights the truck must have while passing through these States, it is quite evident that such a thing is utterly impossible when we get into the domain of crime, its suppression and punishment.

This is best illustrated by comparing the Act here under consideration and the New York extortion statute and what happened thereunder in one well-known case. In our main brief we called attention to the case of *People* v. *Buchalter et al.*, in which a notorious "industrial racketeer" and his labor-union associates were tried, found guilty and sentenced to long terms of imprisonment in the courts of the State of New York. In that case the defendant Buchalter was sentenced to *thirty years'* imprisonment on each count on which he was found guilty. But the Anti-Racketeering Act limits the punishment to be meted out for the same offense; to *ten* years. That the matter of the punishment to be imposed is of the essence of the *regulation*, if the matter is considered from *that* point of view, or of the gravity of the offense, if the matter is to be treated from a purely penal standard, is self-evident. And it is equally self-evident that whatever government has

jurisdiction over the matter to be regulated or the offense penalized must be in a position to prescribe the *norm* of the regulation or the *punishment* to be meted out; and that action by any other government,—must be in the nature of an *interference*.

That the matter of punishment to be meted out for offences defined by the United States is a matter of great concern to the Federal Government is shown by a statement made by Attorney General Butler in his argument in the *Coombs* Case, with reference to the Crimes Act of 1825. In the course of that argument Mr. Butler said:

> "The first Crimes Act of the United States of 1790, and the Act of 1825, show the object of Congress to have been to prevent the perpetration of such crimes as those charged against the defendant. *The penalties imposed by the first Act were found to be too heavy.*"

The Act of 1825 was therefore passed to remedy the defect of the original law by prescribing less drastic penalties. And the history of our own Act shows the importance which Congress attached to the sentence which may be imposed upon those offending against its prohibitions. As the bill passed the Senate it provided for a maximum punishment of *ninety-nine* years. That maximum was reduced by amendment in the House to *ten* years, and it was in that form that the Act was finally adopted by Congress and became law. In other words, after careful consideration Congress came to the conclusion that a penalty of more than ten years would defeat the purposes of the Act, just as too heavy penalties provided by the Crimes Act of 1790 were found to have defeated the purposes of that Act, which led to the revision of that Act by the Act of 1825. But, under the theory of the Government, Mr. Buchalter may be sent to prison by the State of New York for thirty years, even though in the deliberate judgment of Congress a penalty of more than ten years would defeat the purposes of the Act.

The moral of which is: *The right to regulate in a legislative sense means the right to determine not only what may be done and what may not be done, but also how and in what manner a violation of what is prohibited may be punished.*

XI

The theory of Government counsel upon which they seek to sustain the constitutionality of this Act violates the uniformity principle of Federal legislation.

The above considerations lead us to another aspect of the case,—*the problem of uniformity.* It is of the very essence of our dual system of government that the matters which belong in the federal domain are either matters which affect *the whole* nation or matters requiring uniformity of treatment *throughout the nation.* In order, therefore, that this statute may be sustained it must be assumed that the situation became such in the course of our history that by 1934 Congress came to the conclusion that the particular matter involved requires uniform treatment, and cannot therefore be left to the States. The very action of Congress in legislating on the subject implies a determination that uniformity of legislation is necessary. But that is merely the obverse of a statement the reverse of which is that the States cannot be permitted to meddle with the subject. For if the States are competent to act at all, they are competent to act in *different* ways, thus destroying uniformity. We know that the State of New York has acted in a manner to prescribe a different punishment from that prescribed by Federal Government. The other forty-seven States may act in forty-seven different ways, some prescribing less than the federal statute and some prescribing more, in an almost infinite variety of gradations, due to the variety of opinion on the subject, as that may be affected by *local conditions.* The uniformity principle which is the basis of the federal power to act in the premises excludes the possibility of State action on the same subject.

XII

The theory of Government counsel upon which they seek to sustain the constitutionality of this Act would make our criminal law unworkable.

We have already discussed in our main brief certain aspects of this subject. We desire, however, to call attention here to one additional aspect of this problem,—namely, *the role of the writ of habeas-corpus in the relation of the Federal and State courts in the field of criminal law.*

It is one of the settled principles of our criminal law that a person convicted of crime in a state court, contesting the jurisdiction of that court, may come into the federal courts to test that jurisdiction by suing out a writ of *habeas corpus.*

In re *Neagle*, 135 U. S. 1.

And, as that case shows, the mere *existence* of a federal law governing the subject, is sufficient to make at least a *prima facie* case of lack of jurisdiction in the State courts. Indeed, that case goes much further and in fact conclusively establishes the impossibility of there being two laws, one federal and one state, governing the same offense. But quite aside from that, it is evident that if the present Act be constitutional, and this Court does not clearly establish the proposition that there has been a transfer of jurisdiction of the crimes of racketeering and extortion from the States to the Federal Government, everyone convicted in a state court of this class of offenses will have the right to test the conviction in the federal courts; and the federal courts will have to examine in each case into the question of the degree of interstate commerce involved, so as to be in a position to determine whether or not the plea of lack of jurisdiction in the state court has been sustained.

XIII

The protection of individual citizens against double jeopardy is as important as the proper distribution of governmental powers under our constitutional system.

The foregoing discussion concerned itself solely with the problem of the constitutional distribution of power between the Federal government and the States, and the proper workings of governmental power generally. But under our constitutional system, the safeguards of the rights of the citizen in criminal prosecutions is as important as the proper distribution of powers of government. And the constitutional guarantee against double jeopardy is clearly invaded by this Act, if it should be construed to mean that both governments can prosecute a citizen for the same extortion. We have discussed this point in our main brief, but counsel for the Government chose to completely ignore it. This cavalier treatment of the subject by counsel for the Government does not take it out of the case. It is still there, and presents one of the most serious problems in the case.

PART TWO

THE INDICTMENT IS VIOLATIVE OF BASIC LEGAL PRINCIPLES AS WELL AS OF CONSTITUTIONAL GUARANTEES.

I

The failure to allege overt acts is contrary to basic legal principles.

Counsel for the Government chose to ignore completely the point made in our main brief that the indictment is insufficient because it fails to allege any overt act. The only expression of opinion we have as to the theory of the prosecution on this subject is the statement contained in the opinion of the District Court in overruling the demurrer to the indictment, which was as follows:

> "With respect to the contention that it is necessary to list in the indictment certain overt acts, the same rule applies to this statute as to the Sherman Anti-Trust Act" (fol. 286).

We respectfully submit that this is a clearly erroneous conception of the law on our subject,—for the Anti-Racketeering Act is of an entirely different order from the Sherman Anti-Trust Act. The Sherman Anti-Trust Act does not deal with particular acts but with their effect upon commerce as a whole. Nor with offenses against individuals but against the community as a whole.[8] An indictment for conspiracy under the Sherman Act is therefore of a different *nature* than an indictment for conspiracy to commit an act the essence of which is harm to an individual, such as extortion. Under the Sherman Act, the agreement is itself the substantive offense, and the object of the crime is not any merchant

[8] See *United States* v. *Patterson*, 55 Fed. Rep. 605.

but commerce itself. Therefore, when an indictment sufficiently alleges a conspiracy to restrain or to monopolize commerce, *it has thereby already alleged the overt acts* constituting the same. This is particularly true in indictments under Section 1, *since* the substantive offense can be committed without any affirmative act whatever. *For affirmative action may not be required in order to carry the conspiracy into effect.*

But the matter is entirely different under our Act, since the conspiracy could not be carried into effect without the commission of some affirmative act; and it is therefore necessary, under basic principles of our law, that *something* be done in order that the persons who formed the design may be guilty under the Act. In this respect, we respectfully call the attention of the Court to the fact that a "conspiracy" to commit an offense under a statute like the present one really means an *attempt* to commit the offense. And certainly, no *attempt* to commit can be properly charged, unless something has actually been done in pursuance to the conspiracy.

II

The indictment is violative of constitutional guarantees.

In our main brief, we have shown by careful analysis of the indictment and the citation of decisions of this Court, that the indictment herein violates basic principles of Anglo-Saxon jurisprudence which are now part of our Bill of Rights. We have shown that under the Fifth Amendment the indictment must state the offense with sufficient particularity to enable a court, in case of a second prosecution, to determine, from a mere reading of the two indictments, whether or not they cover the same or different offenses. And also, that under the Sixth Amendment the indictment must state the offense with such

particularity as to enable the defendant to properly prepare for trial.

That the decisions of this Court construing the Fifth and Sixth Amendments require the indictment to be in the form contended for by us is not denied. But, we are told, that as to the requirement under the Sixth Amendment,—

> "The Courts, *in recent years*, have rarely sustained objections grounded upon the alleged failure of the indictment to inform the accused of the nature of the charge against him."

We were not aware of any tendency on the part of the courts "in recent years" to abolish the Sixth Amendment. But if there be such a tendency, that should be the more reason why this Court should put a stop to it. The Constitution is a law for the courts as well as for other departments of the Government; and it is astounding to have counsel for the Government seriously suggest that a recent tendency in the lower courts could abrogate constitutional guarantees.

In addition to the negative proof against the continued existence of the Sixth Amendment, deduced by counsel for the Government from the absence of recent decisions enforcing it, they also attempt to cite some decisions apparently intended to prove affirmatively that the Sixth Amendment has fallen into innocuous desuetude. But, fortunately, this attempt is an utter failure; as an examination of the cases cited by them conclusively demonstrates.

One of the cases cited in this connection, is the case of *Mercer* v. *U. S.* (61 F. [2d] 97) decided by the Circuit Court of Appeals of the Third District. But all that that case decides is that in an indictment under the Sherman Anti-Trust Act there need not be such particularization of *individual acts* as would be required in an indictment for an ordinary crime, which consists of some affirmative action against an individual or property,—such as murder,

robbery, arson, or extortion. The reason for that is obvious, as has already been stated above: The object delicti under the Sherman Act is commerce and trade. In describing the effect on commerce or trade as such, it is obviously immaterial as to whether the persons engaged in the commerce affected are ABC or XYZ. And that is all that that case holds. We do not know of any case which holds that the commerce or trade restrained or monopolized may be left undescribed in the indictment; and we are certain that no such indictment has ever been sustained by any court.

In this connection, we respectfully call the attention of the Court to the fact that in the case at bar, although the indictments were identical under both the Sherman Act and the Anti-Racketeering Act, we did not appeal to the Circuit Court of Appeals from the order overruling the demurrer to the indictment under the Sherman Act. Indeed, while formally the demurrers to the two indictments were identical, the *grounds* which we urged in support of the demurrers were quite different,—and we did not urge the point we are now urging in support of our demurrer to the indictment under the Sherman Act, since the commerce and trade affected were sufficiently described in the indictment.

But the situation is quite different with respect to the Anti-Racketeering Act,—which has nothing to do with *restraints* or *monopolization* of trade. In this connection, we respectfully call the attention of the Court to the fact that nowhere in the Anti-Racketeering Act is there any reference to *restraints* of trade. The Act does not deal with restraints; and it is therefore utterly immaterial under the Act, whether the acts complained of restrain trade or do not restrain it. The nature of the trade and commerce involved is therefore utterly immaterial to the indictment; and its only place in the indictment is by way of inducement,—to show that trade and commerce were in some way *affected*. Or, rather, that the extortion complained of was "in connection with" an act, which in some way or some

degree, *affected* trade or commerce, or an article or commodity moved or about to be moved in trade or commerce. The offense itself is the ordinary offense of extortion, which can only be committed by extorting money from somebody; and a conspiracy under this Act can only be effectuated by *attempting* to extort money from *somebody*.

This brings us to a consideration of the three cases from this Court, which are cited by counsel for the Government, in addition to the anti-trust case cited from the Circuit Court of Appeals.

The first of these cases (*Hagner* v. *U. S.*, 285 U. S. 427), is not only cited but is also quoted from. And the passage quoted is to the effect that "the rigor of old common law rules of criminal pleading, has yielded, in modern practice, to the general principle that *formal* defects, *not prejudicial*, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet.'"

We are quite willing to be judged by that rule. For we are not complaining of any *formal* defects, but of the fact *that the facts stated in the indictment do not apprise the defendants of the actual facts which the prosecution intends to prove at the trial.* Clearly, an indictment which says, that during a period of about a year and a half, the defendants engaged in a conspiracy to obtain money from every owner or driver of an over-the-road truck coming into New York City, is no aid whatever in preparing one's defense. Under that allegation, any one of the hundreds of thousands, and possibly millions, of owners or drivers of over-the-road trucks that rolled into New York City during that period of time could be produced at the trial, in order to substantiate that allegation. In this connection, it is necessary to point out here that the trial court did not restrict the proof to any monies obtained or attempted to

be obtained or any violence used or attempted to be used, by the defendants named; but that most of the evidence related to alleged "threats" by unidentified persons, whose acts were considered to be relevant because they were, *or claimed to be*, members of Local 807. And when it is borne in mind that Local 807 has some ten thousand members, it will become apparent how utterly impossible it would be to meet such a charge on the basis of the information contained in the indictment, which, under specific constitutional provisions as interpreted by this Court, must by itself "apprise" the defendant of the nature of the charge with such particularity as to *enable him to prepare for trial.*

In this connection, we deem it our duty to respectfully call the attention of this Court to another practice which has grown up *in recent years* in the administration of the criminal law in the lower federal courts.

On the argument of this demurrer, counsel for the Government took the position that it is not the province of the indictment to give the defendant the particulars which he may need in order to prepare for trial. That, they said, is the function of a bill of particulars. The District Court having adopted the position of Government counsel, counsel for the defendants moved for a bill of particulars. That motion was met with the assertion that bills of particulars are *rarely, if ever, granted in criminal cases. So the motion for a bill of particulars was denied,* and the defendants compelled to go to trial without any information whatsoever,—with the inevitable result that they could not meet most of the evidence referred to above, which was difficult to meet in any event, but quite impossible of meeting when not only the persons who made the threats but *the persons allegedly threatened* were unidentified until after they had given their testimony. That this procedure did not meet the requirements of *due process,* seems to us self-evident. We have not included in our appeal the order which denied our motion for a bill of particulars, for the reason that we believe that under our Constitution,

the indictment itself must sufficiently apprise the defendant of the nature and particulars of the crime to enable him to prepare his defense.

Counsel for the Government attempt to meet this clear violation of the constitutional guarantees by the assertion that the courts have held that the rules applicable to indictments charging substantive offenses are not applicable to indictments charging conspiracy. It would be a sufficient answer to this assertion that the Constitution knows of no such distinction. Both the Fifth and Sixth Amendments apply to all criminal prosecutions. But, as a matter of fact, the courts have not established any such rule,—if we read the decisions of this Court aright. And we need not go outside of the cases cited by Government counsel on their brief in order to establish the correctness of our contention. We shall therefore proceed to examine the two other cases cited (but not quoted from, or otherwise discussed) by Government counsel on their brief.

The first of these cases is that of *Wong Tai* v. *U. S.*, 273 U. S. 77. That case was an indictment for conspiracy to violate the statute commonly known as the Opium Act, (now Section 171 of Title 18, U. S. C. A.), which makes it a crime for any person to receive, buy or sell opium, (after importation), in violation of certain prescribed regulations. The indictment was attacked as insufficiently describing the crime, but the indictment upheld. And the case is cited by Government counsel as allegedly supporting their contention that it is not necessary, in a conspiracy case, to inform the defendant as to what he is charged with conspiring to do, by the statement of particular facts which one can lay hold on in the preparing one's case for trial. But an examination of that case shows that far from sustaining the contention of the prosecution, it actually proves our contention.

A reference to the record on appeal in that case will show that the *acts* constituting the alleged offense, were described with almost the particularity of a bill of particulars. But we need not go to the record,—the opinion of

this Court gives a sufficient description of the indictment to show that it contained the very facts that we claim a good indictment in a conspiracy case must contain. Said the Court:

> "The indictment * * * charged that on or about September 10, 1922, * * * the defendant * * * conspired * * *, that is to say, that at the time and place aforesaid, he knowingly and feloniously conspired and agreed with one Van Drew and divers other persons, to the Grand Jury unknown, knowingly and feloniously received, concealed, buy, sell, and facilitate the transportation and concealment, after importation, of *certain* narcotic drugs, to wit, smoking opium, the said defendant well knowing the said drug to have been imported into the United States and into the jurisdiction of this Court, contrary to law; and that this conspiracy continued throughout the times after September, 1922, mentioned in this indictment, *and particularly at the time of the commission of each of the overt acts thereinafter set forth;* and that in furtherance of this conspiracy and to effect its object, the defendant, in the City and County of San Francisco, received, bought, sold and facilitated the transportation, after importation, of *three small sacks containing tins of opium, which arrived on the Steamer President Pierce, on or about February 24, 1923* * * * *and also* * * * *other sacks containing tins of opium* * * * *namely* * * * *five sacks which arrived on the Steamer Nanking, on or about May 10, 1923, three sacks which arrived on the Steamer President Wilson, on or about May 25, 1923, five sacks which arrived on the Steamer Taiyo Maru on or about May 27, 1923, five sacks which arrived on the Steamer President Taft on or about June 29, 1923, two sacks which arrived on the Steamer President Lincoln on or about August 19, 1923, and one sack which arrived on or about February 3, 1923* * *."

Wong Tai v. *U. S.*, 273 U. S. 77, 79-80.[9]

[9] It may be noted here that although the opinion refers to the specific acts mentioned as "overt acts", those acts were not listed at the end of the indictment under the heading "overt acts", but were contained in the charging part of the indictment.

The second of these cases (*Thornton* v. *U. S.*, 271 U. S. 414) was an indictment for conspiracy to interfere with certain federal employees in the performance of their duties, and to prevent them from carrying out the same. The federal employees involved were cattle inspectors employed by the Bureau of Animal Industry of the United States Department of Agriculture; and the duties involved were those of inspecting cattle, in order to prevent the transportation of diseased cattle from one State into another. The indictment was attacked for insufficiently describing the offense, and this Court sustained the indictment against such attack. But here, too, an examination of the indictment will show that it contained the very facts which we contend an indictment for conspiracy must contain in order to meet the test formulated by this Court in order to meet the requirements of the Sixth Amendment. The charging part of the indictment was as follows:

> "That heretofore, to wit, on the tenth day of July, in the year Nineteen Hundred Twenty * * * defendants * * * in the * * * did * * * conspire, combine, agree and confederate, together to commit an offense against the United States, that is to say said defendants, above named did on said date * * * conspire, combine, confederate and agree to use deadly and dangerous weapons, to-wit * * * for the purpose of deterring and preventing R. S. English, H. L. Murphey, W. D. Counts, J. P. Wimberly, Henry Howell, Ray S. Ritchey, John Lofton, Frank Peterson and Max C. Lockridge, all employees of the Bureau of Animal Industry of the United States Department of Agriculture, from discharging their duties as such employees of said Bureau of Animal Industry, which said employees were then and there charged with the duty of supervising the shipping of * * * cattle, to-wit * * *"

And in addition, the indictment contained a list of "overt acts" which gave further specifications as to the dates and places when any of the particular employees of the Bureau of Animal Industry, mentioned in the charging part of the indictment, had been assaulted and by whom.

(Transcript of record, pp. 1-3).
Thornton v. *U. S.*, 271 U. S. 414.

It is therefore clear that not only is there nothing in the decisions of this Court to countenance the abrogation of constitutional guarantees for which Government counsel contend, but that up to *the most recent times* Government counsel did not think of preparing an indictment in accordance with the recipe followed in this case.

But we are told that this recipe has been approved by the Circuit Court of Appeals for the Eighth Circuit in *Wolpa* v. *U. S.*, 86 F. (2d) 35, and this Court denied certiorari (299 U. S. 611).

At first glance it would seem that that case did countenance some such doctrine as is contended for by Government counsel. But an examination of the case will show that it is no authority for any such doctrine. The way counsel for the Government discuss the case it would seem as if it were an indictment for a conspiracy to defraud, and that the Court held that it is sufficient, *in such a case*, to allege that the defendants had conspired to defraud the world at large, or a certain specific portion thereof. But an examination of the case will show that it was not an indictment for *conspiracy to defraud*, but an indictment *for conspiracy to use the U. S. mails* in connection with a scheme to defraud,—which is quite another matter. The gist of *that* offense is *not* the scheme to defraud but the conspiracy *to use the mails*. The facts which must be set out in the indictment in such a case with particularity, are not those which refer to the scheme to defraud,—which is not an offense under the federal statutes,—but those with respect to *the use of the mails*, which *is* the offense.

In this connection, it is well to look at the statute which was involved in that case,—Section 338, Title 18, U. S. Code. That section, insofar as material here, is as follows:

> "Whoever, *having devised* or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretences,

representations or promises * * * shall for the purpose of executing such scheme or artifice, or attempt so to do, *place or cause to be placed*, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, *in any post office, or station thereof, or street or other letterbox of the United States* * * * to be sent or delivered by the Post Office establishment of the United States * * * shall be fined * * *."

It will thus be seen that the offense is not the scheme to defraud,—which, as we have stated, is not a federal offense at all,—but *the placing or depositing of the mail matter* in the United States post office, for delivery purposes. It is that offense that must be described with particularity, within the rule contended for by us here. And that *was* properly described in the indictment in that case.

We shall now turn briefly to the question of the sufficiency of the indictment when tested by the constitutional guarantee against double jeopardy. The two questions are really two aspects of one and the same subject,—for those requirements which are sufficient to "apprise" the defendant, are also sufficient to identify it. An indictment in which the offense is described with such particularity as to enable the defendant to prepare for trial, without any knowledge other than the indictment, is usually also sufficient to identify it when the problem of double jeopardy arises in a subsequent prosecution. On the other hand, when it is insufficient for identification when the problem of double jeopardy arises, it does not give the defendant sufficient information to prepare for trial.

But we are told that in this case there is no danger of double jeopardy, because whatever may be its sufficiency under the due process requirement of apprising the defendant of the nature of the charge against him, there is no danger of double jeopardy because certain dates are given in the indictment and a certain commerce and trade is described therein. The difficulty with this argument is,

that it is based on the same kind of a misunderstanding as that which is involved in the confusion between an indictment for a conspiracy to defraud and one for a conspiracy to use the mails in connection with a scheme to defraud. Again, we must point to the fact that there is nothing in the Anti-Racketeering Act which connects it with restraint of trade. The defendants herein could not be indicted under the Anti-Racketeering Act for restraining any trade, or for conspiring to restrain any trade. The indictment is one for conspiring *to obtain money from individuals* "in connection with" an act affecting interstate commerce in a particular industry. It would, therefore, be no answer to an indictment for *obtaining or conspiring to obtain money from other individuals* in the same industry during the same period of time that the indictment in this case undertook to state a conspiracy covering the whole industry or trade. The answer to that would be that no such indictment lay; and that the fact that such an indictment was drawn is no defense to an indictment for obtaining money from different persons than those involved in the actual trial of this case, even though the trial proceeded under the present indictment.

Of course, the production of the record of the actual trial in this case would protect the defendants if an attempt were made to try them again for conspiring to obtain money from the same persons. But here again we are in the same position as that with respect to the bill of particulars. As this Court interpreted the constitutional guarantee against double jeopardy, *the indictment itself must protect the defendant against double jeopardy, without the necessity of recourse to the record of the trial.*

Unless, indeed, we should adopt the most amazing suggestion of all, made by Government counsel on their brief, namely, that under the Anti-Racketeering Act a defendant who has been tried for obtaining money, or for conspiring to obtain money, from certain persons, is thereby absolved from prosecution for obtaining, or conspiring to obtain,

money from other persons in the same industry, provided the indictment was drawn so as to charge the defendant with obtaining money or conspiring to obtain money from everyone in that industry. Such a doctrine is not only contrary to our basic concepts of legal procedure,—it is also extremely dangerous for the community. Such a doctrine, if adopted, would permit a dishonest District Attorney,—and District Attorneys have been known to be dishonest sometimes,—to indict a person guilty of the most heinous offenses, under an omnibus indictment such as that in this case, and attempt to prove at the trial the obtaining of money, which the defendant had not obtained, and thereby give the defendant an "immunity bath" for all the crimes which he had actually committed. Fortunately for both the community at large and the individual citizens, there is nothing in the Act which warrants such a construction.

Dated: New York, N. Y., January , 1941.

Respectfully submitted,

LOUIS B. BOUDIN,
EDWARD C. MAGUIRE,
Attorneys for Petitioner Local 807.

LOUIS B. BOUDIN,
Attorney for Petitioner Cahill.

JAMES D. C. MURRAY,
Attorney for individual petitioners other than Cahill.

LOUIS B. BOUDIN,
EDWARD C. MAGUIRE,
JAMES D. C. MURRAY,
of Counsel.

SUPREME COURT OF THE UNITED STATES.

Nos. 131-132.—October Term, 1941.

United States of America, Petitioner, 131 *vs.* Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, et al. Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, et al., Petitioners, 132 *vs.* United States of America.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 2, 1942.]

Mr. Justice Byrnes delivered the opinion of the Court.

This case comes here on cross-petitions for certiorari to review a judgment of the Circuit Court of Appeals reversing the convictions of Local 807 and 26 individuals on charges of conspiracy to violate §§ 2(a), 2(b) and 2(c) of the Anti-racketeering Act of June 18, 1934.[1] The government asks that the judgments of conviction be reinstated. In their cross-petition the defendants seek dismissal of the indictment. We do not regard this as a correct disposition of the case. Since the correctness of the views concerning the meaning of the statute on which the trial court submitted the case to the jury goes to the root of the convictions and their reversal by the Circuit Court of Appeals, we shall confine our consideration of these cases to that issue. Consequently, we are concerned only with whether the defendants were tried in a manner consistent with the proper meaning and scope of the pertinent provisions of § 2 of the Act, which provide:

"Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any

[1] 48 Stat. 479, U. S. C., Title 18, § 420(a). Local 807 and the 26 individuals were also convicted of conspiracy to violate §1 of the Sherman Act (26 Stat. 209, U. S. C. Title 15, §1). The Circuit Court of Appeals reversed the convictions under this indictment as well, but the government does not seek review of this part of its judgment.

article or commodity moving or about to move in trade or commerce—

"(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

"(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear; or under color of official right; or

"(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b);"

The proof at the trial showed that the defendant Local 807 includes in its membership nearly all the motor truck drivers and helpers in the city of New York, and that during the period covered by the indictment defendants Campbell and Furey held office in the Local as delegates in charge of the west side of Manhattan and the other defendants were members. Large quantities of the merchandise which goes into the city from neighboring states is transported in "over-the-road" trucks which are usually manned by drivers and helpers who reside in the localities from which the shipments are made and who are consequently not members of Local 807. Prior to the events covered by this indictment, it appears to have been customary for these out-of-state drivers to make deliveries to the warehouses of consignees in New York and then to pick up other merchandise from New York shippers for delivery on the return trip to consignees in the surrounding states.

There was sufficient evidence to warrant a finding that the defendants conspired to use and did use violence and threats to obtain from the owners of these "over-the-road" trucks $9.42 for each large truck and $8.41 for each small truck entering the city. These amounts were the regular union rates for a day's work of driving and unloading. There was proof that in some cases the out-of-state driver was compelled to drive the truck to a point close to the city limits and there to turn it over to one or more of the defendants. These defendants would then drive the truck to its destination, do the unloading, pick up the merchandise for the return trip and surrender the truck to the out-of-state driver at the point where they had taken it over. In other cases, according to the testimony, the money was demanded and obtained, but the owners or drivers rejected the offers of the defendants to do or help with the driving or unloading. And in several cases the jury

could have found that the defendants either failed to offer to work, or refused to work for the money when asked to do so. Eventually many of the owners signed contracts with Local 807 under whose terms the defendants were to do the driving and unloading within the city and to receive regular union rates for the work. No serious question is raised by the evidence as to the ability of the defendants to perform the labor involved in these operations.

The first count of the indictment was based upon § 2(a) of the Act and charged a conspiracy "to obtain the payment of money . . . . [from the owners] by the use of, attempt to use and threat to use, force, violence and coercion." The second count accused the defendants of conspiring to obtain the property of the owners "with their consent induced by wrongful use of force and of fear," in violation of § 2(b). The third and fourth counts alleged a conspiracy to violate § 2(c) in that the defendants agreed "to commit and threatened to commit acts of physical violence and of physical injury to the persons and property" of their victims in furtherance of the general scheme to violate §§ 2(a) and 2(b). Local 807 and all of the individual defendants were convicted on the first count; the Local and 17 individuals on the second; and the Local and 11 individuals on the third and fourth.

The question in the case concerns that portion of § 2(a) which excepts from punishment any person who "obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, ... the payment of wages by a bona-fide employer to a bona-fide employee."[2] The Circuit Court of Appeals reversed because it believed that the trial court had failed to instruct the jury properly with respect to this exception.

To ascertain the limits of the exception is a difficult undertaking. Always assuming the presence of violence and threats, as we must in the face of this record, three interpretations of varying restrictive force require consideration: (1) The exception applies only to a defendant who has enjoyed the status of a bona fide employee prior to the time at which he obtains or attempts to obtain the payment of money by the owner. (2) Assuming that this is incorrect and that the exception may affect a defendant who has not been a bona fide

[2] This exception does not appear in § 2(b). But we agree with the Circuit Court of Appeals that it too is subject to the exception. The trial judge's instructions show that he shared this view. And the definition of terms in § 3(b) was apparently intended to achieve this result.

employee prior to the time in question, it does not apply if the owner's intention in making the payment is to buy "protection" and not to buy service, even though the defendant may intend to perform the service or may actually perform it. We understand this to be the position adopted by the government in its brief and argument in this Court. (3) Assuming that both (1) and (2) are incorrect, the exception is not applicable to a defendant who obtains the payment of money if the owner rejects his genuine offer of service. We understand this to be the theory of the dissenting judge below.

Confronted with these various interpretations we turn for guidance to the legislative history of the statute. Pursuant to a Senate Resolution of May 8, 1933,[3] a sub-committee of the Senate Committee on Interstate Commerce which became known as the Copeland Committee, undertook an investigation of "rackets" and "racketeering" in the United States. After conducting hearings in several large cities, the committee introduced 13 bills, of which S. 2248 was one.[4] As introduced, as reported by the Senate Judiciary Committee,[5] and as passed without debate by the Senate,[6] S. 2248 embodied very general prohibitions against violence or coercion in connection with interstate commerce and contained no specific mention of wages or labor. After the bill had passed the Senate, however, representatives of the American Federation of Labor expressed fear that the bill in its then form might result in serious injury to labor,[7] and the measure was redrafted by officials of the Department of Justice after conferences with the President of the Federation. In the course of this revision, the bill assumed substantially the form in which it was eventually enacted. In particular, the exception concerning "the payment of wages by a bona fide employer to a bona fide employee" was added, and a proviso preserving "the rights of bona fide labor organizations" was incorporated in what became § 6 of the Act

[3] S. Res. 74, 73d Cong., 1st Sess.

[4] See 78 Cong. Rec. 457, 73d Cong., 2d Sess.

[5] S. Rep. No. 532, 73d Cong., 2d Sess. The report included a memorandum from the Department of Justice in which it was stated: "The provisions of the proposed statute are limited so as not to include the usual activities of capitalistic combination, bona fide labor unions, and ordinary business practices which are not accompanied by manifestations of racketeering."

[6] 78 Cong. Rec. 5733, 73d Cong., 2d Sess.

[7] 78 Cong. Rec. 5859, 73d Cong., 2d Sess.

as finally passed.[8] In its favorable reports on this revised bill,[9] the House Committee on the Judiciary set forth without comment a letter from the Attorney General to the Committee, dated May 18, 1934. In this letter the Attorney General informed the Committee that the draft of the substitute bill had been "definitely approved" by the President of the American Federation of Labor and his counsel. The letter continued:

"We believe that the bill in this form will accomplish the purposes of such legislation and at the same time meet the objections made to the original bill.

"The original bill was susceptible to the objection that it might include within the prohibition the legitimate and bona fide activities of employers and employees. As the purpose of the legislation is not to interfere with such legitimate activities but rather to set up severe penalties for racketeering by violence, extortion, or coercion, which affects interstate commerce, it seems advisable to definitely exclude such legitimate activities.

"As the typical racketeering activities affecting interstate commerce are those in connection with price fixing and economic extortion directed by professional gangsters, we have inserted subparagraphs (a) and (b), making such activities unlawful when accompanied by violence and affecting interstate commerce."

The substitute was agreed to by both the House and Senate without debate when assurances were given that the approval of organized labor had been obtained.[10] Thereafter, while the bill awaited the signature of the President, Senator Copeland submitted a report[11] in which he referred to S. 2248 as one of eleven bills which had been enacted "to close gaps in existing Federal laws and to render more difficult the activities of predatory criminal gangs of the Kelly and Dillinger types."

This account of the legislative proceedings obviously does not provide specific definition of "wages", "bona fide employer", or "bona fide employee", as those terms are used in § 2(a). But it does contain clear declarations by the head of the Department which drafted the section and by the sponsor of the bill in Congress, first, that the elimination of terroristic activities by profes-

[8] "Provided, that no court of the United States shall construe or apply any of the provisions of this Act in such manner as to impair, diminish, or in any manner affect the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States." U. S. C., Title 18, § 420(d).

[9] H. Rep. No. 1833, 73d Cong., 2d Sess.

[10] 78 Cong. Rec. 10867, 11402-11403, 11482, 73d Cong., 2d Sess.

[11] S. Rep. No. 1440, 73d Cong., 2d Sess.

sional gangsters was the aim of the statute, and second, that no interference with traditional labor union activities was intended.

It may be true that professional rackets have sometimes assumed the guise of labor unions, and, as the Circuit Court of Appeals observed, that they may have "covered their practices by the pretence that the tribute collected was pay for services rendered." And it may also be true that labor organizations of good repute and honest purpose can be misdirected and become agencies of blackmail. Nevertheless, Congress plainly attempted to distinguish militant labor activity from the other and to afford it ample protection. With this legislative purpose uppermost in mind, we return to test the three theories of interpretation of § 2(a) to which we have referred.

(1) We hold that the exemption is not restricted to a defendant who has attained the status of an employee prior to the time at which he obtains or attempts or conspires to obtain the money. In the first place, we agree with the observation of the court below that "practically always the crux of a labor dispute is who shall get the job, and what the terms shall be . . . . ." To exclude this entire class of disputes from the protection of the exception would be unjustifiably to thwart the purpose of Congress as we understand it. In the second place, the structure and language of § 2(a) itself is persuasive against so narrow an interpretation. It does not except "*a bona fide employee* who obtains or attempts to obtain the payment of wages from a bona fide employer." Rather, it excepts "*any person* who . . . obtains or attempts to obtain . . . the payment of wages from a bona fide employer to a bona fide employee." Certainly, an outsider who "attempts" unsuccessfully by violent means to achieve the status of an employee and to secure wages for services falls within the exception. And where, as here, the offense charged is conspiracy to violate the section, the defendants are entitled to immunity if their objective is to become bona fide employees and to obtain wages in that capacity, even though they may fail of their purpose.

(2) The government contends, as we have said, that the test is "whether, under all the circumstances, it appears that the money has been paid for labor or for protection." If the defendants do not offer to work, or if they refuse to work, or if their offer to work is rejected by the owners, the government argues that any payment made to them must be for protection rather than for services. And even if the defendants actually

perform some work, it is said, this circumstance should be regarded as relevant but not controlling in determining "the one crucial issue in every case such as this—namely, whether the money was paid for labor or for protection."

We take this to mean that the intent of the owners in making the payment is to be regarded as controlling. We cannot agree. The state of mind of the truck owners cannot be decisive of the guilt of these defendants. On the contrary, their guilt is determined by whether or not their purpose and objective was to obtain "the payment of wages by a bona fide employer to a bona fide employee". And, of course, where the defendants are charged with conspiracy as they were here, it is particularly obvious that the nature of their plan and agreement is the crux of the case. The mischief of a contrary theory is nowhere better illustrated than in industrial controversies. For example, the members of a labor union may decide that they are entitled to the jobs in their trade in a particular area. They may agree to attempt to obtain contracts to do the work at the union wage scale. They may obtain the contracts, do the work, and receive the money. Certainly Congress intended that these activities should be excepted from the prohibitions of this particular Act, even though the agreement may have contemplated the use of violence. But it is always an open question whether the employers' capitulation to the demands of the union is prompted by a desire to obtain services or to avoid further injury or both. To make a fine or prison sentence for the union and its members contingent upon a finding by the jury that one motive or the other dominated the employers' decision would be a distortion of the legislative purpose.

We are told, however, that under this view such a common law offense as robbery would become an innocent pastime, inasmuch as it is an essential element of that crime that the victim be moved by fear of violence when he parts with his money or property. This objection mistakes the significance of this requirement of proof in the case of robbery. Its true significance is that it places an added burden upon the prosecutor rather than upon the accused. That is, the prosecutor must first establish a criminal intent upon the part of the defendant and he must then make a further showing with respect to the victim's state of mind. The effect of this rule is to render conviction of robbery more, rather than less, difficult. There is no such restrictive evidentiary re-

quirement in prosecutions under this Act. If the objective that these defendants sought to attain by the use of force and threats is not the objective to which the exception in § 2(a) affords immunity, they are guilty and nothing further need be shown concerning the actual motive of the owners in handing over the money. On the other hand, if their objective did enjoy the protection of that exception, they are innocent and their innocence is not affected by the state of mind of the owners. We shall consider in a moment, in point (3) below, the legal consequences which flow from the owners' actual rejection of proffered services. But it needs to be emphasized here that for the owners to reject an offer of services amounts to an overt act on their part. It is conduct or behavior as distinct from intention or state of mind. It is an event which alters the external situation in which the defendants find themselves. The latter must then decide whether they will continue to push their demands for the money. Whether or not they are guilty of an offense under this Act if they choose to do so we shall presently discuss. But that decision must be made in terms of their motives and purposes and objectives rather than those of the owners.

We do not mean that an offer to work or even the actual performance of some services necessarily entitles one to immunity under the exception. A jury might of course find that such an offer or performance was no more than a sham to disguise an actual intention to extort and to blackmail. But the inquiry must nevertheless be directed to whether this was the purpose of the accused or whether they honestly intended to obtain a chance to work for a wage.

(3) There remains to be considered the difficult issue which divided the court below. The whole court agreed that the payment of money to one who refuses to perform the services is not "the payment of wages by a bona fide employer to a bona fide employee", within the meaning of § 2(a); it also agreed that payments to one who has been permitted actually to perform the services do fall within the exception. But it divided over the question whether the payment of money to one whose sincere offer to work is rejected constitutes the payment of "wages" to a "bona fide employee". Since the offense charged here is conspiracy, these questions must be put somewhat differently. Thus, there is no conspiracy to violate the Act if the purpose of the defendants is actually to perform the services in return for the money, but

there is a punishable conspiracy if their plan is to obtain money without doing the work. The doubtful case arises where the defendants agree to tender their services in good faith to an employer and to work if he accepts their offer, but agree further that the protection of their trade union interests requires that he should pay an amount equivalent to the prevailing union wage even if he rejects their proffered services.

We think that such an agreement is covered by the exception. The term "wages," "bona fide employee" and "bona fide employer" are susceptible of more than one meaning, and the background and legislative history of this Act require that they be broadly defined. We have expressed our belief that Congress intended to leave unaffected the ordinary activities of labor unions. The proviso in § 6 safeguarding "the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof", although obscure indeed, strengthens us somewhat in that opinion.[12] The test must therefore be whether the particular activity was among or is akin to labor union activities with which Congress must be taken to have been familiar when this measure was enacted. Accepting payments even where services are refused is such an activity. The Circuit Court has referred to the "stand-by" orchestra device, by which a union local requires that its members be substituted for visiting musicians, or, if the producer or conductor insists upon using his own musicians, that the members of the local be paid the sums which they would have earned had they performed. That similar devices are employed in other trades is well known. It is admitted here that the stand-by musician has a "job" even though he renders no actual service. There can be no question that he demands the payment of money regardless of the management's willingness to accept his labor. If, as it is agreed, the musician would escape punishment under this Act even though he obtained his "stand-by job" by force or threats, it is certainly difficult to see how a teamster could be punished for engaging in the same practice. It is not our province either to approve or disapprove such tactics. But we do believe that they are not "the activities of predatory criminal gangs of the Kelly and Dillinger types" at which the Act was aimed, and that on the contrary they are among those practices of labor unions which were intended to remain beyond its ban.

---

12 See note 8, *supra*.

This does not mean that such activities are beyond the reach of federal legislative control. Nor does it mean that they need go unpunished. The power of state and local authorities to punish acts of violence is beyond question. It is not diminished or affected by the circumstance that the violence may be the outgrowth of a labor dispute. The use of violence disclosed by this record is plainly subject to the ordinary criminal law.

As we have said, the evidence with respect to the crucial issues was conflicting. Thus, the jury might have believed that in some instances the defendants refused to do any driving or unloading when requested to do so, that in other cases they did not offer to work, that in other cases their offers were rejected, and that in still other cases they actually did some or all of the driving and unloading. In the early stages written contracts were not in existence; later, a number of the owners signed contracts and the defendants performed the services for which they called.

The jury's task was difficult. The trial lasted six weeks. The jury required two days in which to reach a verdict, and twice during that period it sought further instructions from the Court, particularly with reference to the law relating to labor activity. In such circumstances, where acts of violence naturally would influence the minds of the jury, the instructions were of vital importance, especially as they affected the question of whether the payments which the defendants conspired to obtain fell within the exception contained in § 2(a). The trial judge made a number of statements which were relevant to this issue, but we agree with the Circuit Court that the following were decisive:

"If the jury find that the sums of money paid by the truck operators were not wages as paid in return for services performed by such defendants, but were payments made by the operators in order to induce the defendants to refrain from interfering unlawfully with the operation of their trucks, then the sums in question may not be regarded as wages paid by a bona fide employer to a bona fide employee.

"The fact that any defendant may have done some work on a truck of an operator is not conclusive as to whether payments received by such defendants were wages; the jury may consider the performance of work by a defendant as evidence of the nature of the relationship between the defendant and the operator as establishing the status of a bona fide employer and a bona fide employee. If, however, what the operator was paying for was not labor performed but merely for protection from interference by the defendants with the operation of operator's trucks, the fact that a de-

fendant may have done some work on an operator's truck is not conclusive."

These instructions embody the rule for which the government contends, and which we think is erroneous for the reasons we have given. Under them the jury was free to return a verdict of guilty if it found that the motive of the owners in making the payments was to prevent further damage and injury rather than to secure the services of the defendants. Whether or not the defendants were guilty of conspiracy thus became contingent upon the purposes of others and not upon their own aims and objectives. Moreover, the charge failed correctly to explain the legal consequences of proof that the owners had rejected bona fide offers by the defendants to perform the services. As we have said, the jury was bound to acquit the defendants if it found that their objective and purpose was to obtain, by the use or threat of violence the chance to work for the money but to accept the money even if the employers refused to permit them to work. While the 48th, 49th and 58th instructions requested by the defendants, all of which were refused, do not constitute a complete exposition of the rules which we regard as applicable to this case, they cover a good deal of the ground and should have been granted. The 48th states that "it is not an offense under the Anti-Racketeering Act for anyone to obtain employment by the use or threat of violence if the intention is to actually work for the pay received, and to give an honest day's work for a day's wage." The 49th declared that "it is not the purpose of the Anti-Racketeering Act to prevent labor unions from attempting to obtain employment for their members, ... and that the use of violence or the threat of violence for such purposes, while punishable under the laws, is not punishable under the Anti-Racketeering Act." The 58th requested charge read as follows:

"I charge you that in order that the defendants herein may be convicted under any one of the four counts of the Anti-Racketeering indictment, you must find a conspiracy under such counts; and that in order to sustain the charge of conspiracy under any one of the counts under the Anti-Racketeering indictment, the proof must show not only that individual defendants obtained money without rendering adequate service, but that it was the aim and object of the conspiracy that . . . [they][13] should obtain money without rendering adequate service therefor."

[13] The words "all of the conspirators", rather than "they", appeared in the requested instruction as submitted to the trial judge. We think that as so expressed the charge would have been erroneous, but that with this change it states the correct rule.

Since the instructions denied and the misleading instructions actually given go to what is indeed the heart of the case, we hold that the convictions cannot stand and that the judgment of the Circuit Court of Appeals must be affirmed.

Affirmed.

Mr. Justice ROBERTS and Mr. Justice JACKSON took no part in the consideration or decision of this case.

[March 2, 1942.]

Mr. Chief Justice STONE, dissenting.

I think the judgment should be reversed, and the convictions affirmed, subject only to an examination of the sufficiency of the evidence as to some of the respondents, and to a consideration of whether the union itself is a "person" within the meaning of the statute.

Respondents, who are members of a labor union, were convicted of conspiracy to violate the Anti-Racketeering Act. They, or some of them, lay in wait for trucks passing from New Jersey to New York, forced their way onto the trucks, and by beating or threats of beating the drivers procured payments to themselves from the drivers or their employers of a sum of money for each truck, $9.42 for a large truck and $8.41 for a small one, said to be the equivalent of the union wage scale for a day's work. In some instances they assisted or offered to assist in unloading the truck and in others they disappeared as soon as the money was paid without rendering or offering to render any service.

The Anti-Racketeering Act condemns the obtaining or conspiracy to obtain the payment of money or delivery of property by "the use of . . . force, violence or coercion . . ." To this definition of the offense Congress added two—and only two—qualifications. It does not embrace the "payment of wages by a bona fide employer to a bona fide employee", and the provisions of the Act are not to be applied so as to "affect the rights of bona fide labor organizations in lawfully carrying out the legitimate objects thereof as such rights are expressed in existing statutes of the United States".

There is abundant evidence in the record from which the jury could have concluded that respondents, or some of them, conspired to compel by force and violence the truck drivers or their employers to pay the sums of money to respondents or some of them; that the payments were made by the drivers or truck owners to purchase immunity from the violence of respondents and for no other reason; and that this was the end knowingly sought by respondents.

I can only conclude that such conduct accompanied by such a purpose constitutes a violation of the statute even though the defendants stood ready to unload the trucks in the event that they were hired to do so. Unless the language of the statute is to be disregarded, one who has rejected the proffered service and pays money only in order to purchase immunity from violence is not a bona fide employer and is not paying the extorted money as wages. The character of what the drivers or owners did and intended to do—pay money to avoid a beating—was not altered by the willingness of the payee to accept as wages for services rendered what he in fact intentionally exacted from the driver or owner as the purchase price of immunity from assault, and what he intended so to exact whether the proffered services were accepted or not. It is no answer to say that the guilt of a defendant is personal and cannot be made to depend upon the acts and intention of another. Such an answer if valid would render common law robbery an innocent pastime. For there can be no robbery unless the purpose of the victim in handing over the money is to avoid force. Precisely as under the present statute, the robber's use of force and its intended effect on the victim are essential elements of the crime both of which the prosecutor must prove. Under this statute when both are present the crime is complete, irrespective of other motives which may actuate the offender, if he is also aware, as we must take it the jury found, that the money is not in fact paid as wages by a bona fide employer. It is a contradiction in terms to say that the payment of money forcibly extorted by a payee who is in any case a lawbreaker, and paid only to secure immunity from violence, without establishment of an employment relationship or the rendering of services, is a good faith payment or receipt of wages.

Even though the procuring of jobs by violence is not within the Act, and though this includes the "stand-by" job where no actual service is rendered, the granted immunity, unless its words be disregarded, does not extend to the case where the immediate objective is to force the payment of money regardless of the victim's willingness to accept and treat the extortioner as an employee. It was for the jury to say whether such was the objective of respondents and whether they were aware that the money was paid because of their violence and not as wages.

When the Anti-Racketeering Act was under consideration by Congress, no member of Congress and no labor leader had the temerity to suggest that such payments, made only to secure immunity from violence and intentionally compelled by assault and battery, could be regarded as the payment of "wages by a bona fide employer" or that the compulsion of such payments is a legitimate object of a labor union, or was ever made so by any statute of the United States. I am unable to concur in that suggestion now. It follows that all the defendants who conspired to compel such payments by force and violence, regardless of the willingness of the victims to accept them as employees, were rightly convicted.

If I am right in this conclusion there was no error in the instructions to the jury. All the counts of the indictment were for conspiracy to violate the statute. The jury was told that to convict it must find conspiracy or agreement by respondents to violate the statute and that they must have the purpose or intention to commit the crime which it defined. As I have said, the intention to commit the offense includes the intention to use force and violence on the victim and the intention that the victim shall pay because of it. The jury was then instructed that the offense defined by the statute was the obtaining of money or property by force and violence but that "the jury may not find the defendants guilty on any count of the Anti-Racketeering Act indictment if the money which they are charged with having obtained from truck owners through the use of force and violence or threats of force and violence was paid as wages, and if the defendants who received the money were bona fide employees and the truck operators who paid the money were bona fide employers . . . If the jury find that the sums of money paid by the truck operators were not wages so paid in return for services performed by such defendants, but were payments made by the operators in order

to induce the defendants to refrain from interfering unlawfully with the operation of their trucks, then the sums in question may not be regarded as wages paid by a bona fide employer to a bona fide employee . . . If, however, what the operator was paying for was not labor performed but merely for protection from interference by the defendants with the operation of the operator's trucks, the fact that a defendant may have done some work on an operator's truck is not conclusive."

Respondents' 48th and 49th requests were rightly refused. So far as they involved a ruling that the obtaining of employment by force and violence does not constitute the offense, the court had already ruled specifically that there could be no substantive offense unless the payment of money or property had been obtained by force. But in any case both requests were erroneous because they made respondents' willingness to work the test of guilt, regardless of the intended and actual effect of the violence on the victims in compelling them to pay the money not as wages but in order to secure immunity from assault. The first part of the 58th request likewise had already been charged. The rest was plainly defective since it required an acquittal unless it was the aim and object of the conspiracy that "all of the conspirators should obtain money without rendering adequate service therefor." Upon any theory of the meaning of the statute, it was not necessary for the Government to show that it was the object of the conspiracy that "all the conspirators" should receive payments of money. They would be equally guilty if they had conspired to procure the payments to some.